S. Hrg. 98-934

CIVIL RIGHTS ACT OF 1984

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

S. 2568

A BILL TO CLARIFY THE APPLICATION OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972, SECTION 504 OF THE REHABILITATION ACT OF 1973, THE AGE DISCRIMINATION ACT OF 1975, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

MAY 30, AND JUNE 5, 1984

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CIVIL RIGHTS ACT OF 1984

WEDNESDAY MAY 30, 1984

U.S. Senate,
Subcommittee on the Constitution,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:42 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, chairman of the subcommittee, presiding.

Present: Senator Thurmond, chairman of the Committee on the Judiciary.

Staff present: Stephen J. Markman, chief counsel; Randall R. Rader, general counsel; Dee V. Benson, counsel; Carol Epps, chief clerk, Deborah Dahl, clerk; and Dick Bowman, counsel of the Committee on the Judiciary.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator Hatch. We are happy to welcome you all to our committee meeting this morning.

Ladies and gentlemen, this marks the first of 2 days of hearings by the Subcommittee on the Constitution on the proposed Civil Rights Act of 1984, and follows a single day of hearings last week by Senator Stafford's Subcommittee on Education. Our hearing today will be the first in either House of Congress to focus on the testimony of critics of this legislation.

The so-called Civil Rights Act of 1984 is ostensibly designed to overturn the Supreme Court's recent decision in *Grove City* v. *Bell* interpreting the provisions of title IX. Title IX of the Education Amendments of 1972, of course, prohibits discrimination on the basis of sex under any "education program or activity" receiving Federal financial assistance. In Grove City, the High Court issued two interpretations that are immediately relevant, and I might add, each of which was generally welcomed by different interests.

First, the Court concluded that an educational institution was covered by title IX even if its only connection with the Federal Government was the fact that some of its students received Federal financial assistance.

Second, the Court concluded that the antidiscrimination provision in title IX was "program-specific" rather than "institution-wide" in the sense that a college receiving assistance for one program will be required to comply with title IX rules and regulations only in the context of that program.

The legislation before us today, S. 2568, would overturn the latter holding of the Court—relating to the "program-specific" character—but would leave unamended the former holding—relating to the receipt by an institution of indirect assistance. In addition, this measure would enact major changes in three other significant permanent civil rights statutes: (1) Title VI of the 1964 Civil Rights Act, perhaps the Nation's singlemost broad civil rights law, which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving Federal assistance; (2) section 504 of the Rehabilitation Act, prohibiting discrimination against handicapped persons under any program or activity receiving Federal assistance; and (3) the Age Discrimination Act of 1975, prohibiting discrimination on the basis of age under similar programs or activities.

In other words, the scope of S. 2568 is far broader than necessary in order only to overturn the effects of the *Grove City* decision.

Although others no doubt will characterize the issues before us differently, I would emphasize my own view that the issue before us is not commitment to title IX—or to any of these other provisions. While I can fully understand why the principal proponents of S. 2568 would prefer to define the debate in these terms, I would respectfully disagree. None of us—including the administration—is enthusiastic about criticizing legislation with so estimable a title as the "Civil Rights Act of 1984."

The issues before us, however, in the context of this legislation are not those relating to civil rights, but rather those relating to traditional lines of distinction between the public and private sectors, and between the Federal and State and local governments. As President Reagan has described it, this legislation would "open the door to Federal intrusion in State and local governments in any manner of ways beyond anything that has ever been intended by the Civil Rights Acts." Similarly, the Justice Department has concluded that this legislation is of such "sweeping scope" that it contains "serious constitutional implications" and may lead to "impermissible interference with important State prerogatives."

The issues before us have very little to do with traditional notions of discrimination. Rather, they have to do with Federal authority to dictate policy for private institutions and State and local governments. A few of the critical issues that have been raised by responsible commentators on the proposed legislation are as follows:

Will retail pharmacists be subject to title VI regulation because they process medicare- and medicaid-subsidized prescriptions?

Will grocery stores be subject to title VI regulations because they benefit indirectly from Federal food stamp programs?

Will American farmers have to abide by the Rehabilitation and Age Discrimination Acts if they receive Federal crop subsidies?

Will religiously founded colleges have to abide by title IX policies on such matters as abortion policy if they receive even $1 in Federal assistance for their secular educational programs?

Will the receipt of $1 in highway assistance by the State of California subject every city, county, and sanitation district in that State to Federal rules and regulations?

Will the receipt of $1 in sewer assistance by Falls Church, VA, subject the entire State of Virginia, including every other community, to Federal rules and regulations?

Will the receipt of $1 in Federal assistance to the Biology Department at the State University of New York at Utica subject every one of the 18 other university branches to Federal rules and regulations in every one of their departments?

Will every community within a covered State have to abide by the "equal results" conception of "discrimination" in the context of their hiring policies, the police exams, their firefighter exams, and so forth?

Will Operation Push and the Urban League and the NAACP be subject to private actions if they receive direct or indirect Federal assistance, and fail to employ "proper" numbers of racial and ethnic groups?

Ladies and gentlemen, these and other possibilities raise not only serious policy issues, but serious constitutional issues as well. There are constitutional limits to the ability of the Federal Government to set conditions and to interfere with the governmental functions of sovereign State governments as a function of its spending authority. It is my intention to explore both the policy and constitutional implications of this legislation, in its present form, during the course of these 2 days of hearings.

Finally, I would like to note for the record my disappointment with those individuals and organizations who have suggested that S. 2568 in its present form, is sacrosanct and that, unless one is willing to swallow this bill word for word and line for line, then one is simply not dedicated to the objectives of title IX or any of the other provisions here. These individuals and organizations refuse, so they say, to tolerate any amendments to this bill. In doing so, I am afraid that they demean the legislative and deliberative processes.

I am confident that the great majority of my colleagues in both Houses do not share this perspective that scrutiny and analysis and modification of the pending bill reflect any lack of commitment to either civil rights or equal opportunity. I am confident that they do not equate legislative inquiry about the implications of S. 2568 with antagonism toward title IX or title VI or any other law affected here.

Whatever ultimately happens to this legislation, and recognition of the 63 cosponsors of this measure has denied me any illusions—it is my intent that these hearings serve to establish some measure of legislative history on what this proposal means.

I very much look forward to the outstanding group of witnesses who will be appearing with us today, and welcome them to this committee.

[The prepared statements submitted by Senator Thurmond and Senator Leahy follow:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Mr. Chairman, today we begin to receive testimony on the various aspects and potential impact of the recent Supreme Court decision in the case of *Grove City College* v. *Bell*.

This case involved Grove City College, a private, coeducational, liberal arts college in Pennsylvania. It had been the policy of this institution to totally refrain from acceptance of any form of government financial assistance whether State, local or Federal. Adhering to this policy, Grove City College opted against participation in the Regular Disbursement System of the U.S. Department of Education. However, the college did enroll students who were recipients of Basic Educational Opportunity Grants.

In deciding this case, the High Court was presented with two principal issues. First, whether the receipt of Federal financial aid by some students was sufficient to make the school subject to Title IX of the 1972 Education Amendments. If the college was subject to Title IX, the Court then had to decide the second issue dealing with the scope of that Title within the various college departments.

After concluding that Title IX coverage was triggered by the receipt of basic grants by some students, the Court diverged from the view asserted by previous Administrations as to applicability of these antidiscrimination provisions. Citing the program-specific limitation of Title IX, the Court held that the receipt of basic grant money by some students does not trigger institutionwide coverage under that law. On the contrary, the basic grants represented financial assistance to the Grove City College financial aid program and it was only that educational activity of the college that could lawfully be regulated under the Title IX nondiscrimination provision.

Since the *Grove City Case,* there has been considerable discussion of the impact that this Supreme Court decision will have on other civil rights statutes. The other statutes believed to be affected are the Rehabilitation Act of 1973, the Age Discrimination Act, and Title VI of the 1964 Civil Rights Act. Many of my colleagues support legislation, S. 2568, which seeks to address what they perceive to be the adverse impact of the *Grove City Case* on these laws.

Before Congress takes steps to amend any existing civil rights statutes, the *Grove City Case* itself and any proposed corrective legislation must be thoroughly analyzed to ensure that we know as precisely as possible what the long-range effects of *Grove City* are likely to be. We must ensure that any legislation on this subject will not amount to overreaching by the Federal Government into areas not within the original contemplation of Congress when it adopted these important statutes, also, we must explore the wisdom of expanding Federal power in these fields.

For these reasons, I look forward to hearing from our distinguished witnesses today. Mr. Chairman, I commend you for your keen interest in this issue and for your fine efforts in holding this hearing.

PREPARED STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

On February 28, 1984 the Supreme Court rendered a decision that struck a severe blow against our national policy of eliminating unfair discrimination.

Grove City College v. *Bell* held that the prohibition against sex discrimination in higher education contained in Title IX of the Education Amendments of 1972 applies only to programs that directly receive federal funding, rather than to all programs at colleges which enjoy federal support.

But more than education is involved. The language of Title IX has a parallel in three other vital discrimination laws, Title VI of the 1964 Civil Rights Act, which outlawed discrimination based on race, color, or national origin in any federally assisted program; section 504 of the Rehabilitation Act of 1973, barring discrimination against the handicapped; and the Age Discrimination Act of 1975.

Since the introduction of legislation that I was proud to cosponsor on April 12 of this year, there has been no shortage of critics of this bill whose main point seems to be that in the guise of protecting what has been achieved through these four historic statutes, the 63 Senate cosponsors are actually pushing into broad, new uncharted territory.

Nothing could be farther from the truth. We have heard examples of horror stories in past hearings, but in every single case the scare hypotheticals have either amounted to events that cannot possibly occur under this legislation—like the food stamp recipient who causes a mom-and-pop grocery store to install a ramp for the handicapped—or events that will actually happen but would have also happened before *Grove City*. An example of this would be numerous critics who have raised the point that the bill would have the effect of placing under federal scrutiny for gender discrimination and educational program of any public or private institution which receives a dollar of federal aid.

This kind of hushed-tone revelation says in effect that for coverage purposes all functions within a college will be covered under the bill if the college receives federal aid. This is the overwhelming view of the law prior to *Grove City*. The pre-*Grove City* law treated termination of fund actions quite differently. Unless a particular department of a college or university received federal funds and engaged in discrimination, its funds could not be terminated.

This contrast between coverage and fund termination has been faithfully maintained in the legislation before this Committee, as I think will be very clear to the Senate and the public by the time the hearing process is completed.

I believe that the ultimate result of these hearings and the record of the other hearings on this bill will demonstrate that the cries of alarm are totally unfounded.

The Civil Rights Act of 1984 is a carefully drafted and very moderate piece of legislation. It should be examined thoroughly, I agree. But based on the criticisms that have surfaced so far, I am confident that the result of this process will be the prompt passage of the bill.

We owe nothing less to every American, for we all have a stake in fairness, and fairness is what we are here to protect this afternoon.

[The bill, S. 2568, follow:]

II

98TH CONGRESS
2D SESSION

S. 2568

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

IN THE SENATE OF THE UNITED STATES

APRIL 12 (legislative day, MARCH 26), 1984

Mr. KENNEDY (for himself, Mr. PACKWOOD, Mr. PELL, Mr. DOLE, Mr. CRANSTON, Mr. STAFFORD, Mr. LEAHY, Mr. WEICKER, Mr. MOYNIHAN, Mr. STEVENS, Mr. BAKER, Mr. BAUCUS, Mr. BENTSEN, Mr. BIDEN, Mr. BINGAMAN, Mr. BOSCHWITZ, Mr. BUMPERS, Mr. BRADLEY, Mr. BURDICK, Mr. BYRD, Mr. CHAFEE, Mr. CHILES, Mr. COHEN, Mr. DANFORTH, Mr. DECONCINI, Mr. DIXON, Mr. DODD, Mr. DOMENICI, Mr. DURENBERGER, Mr. EAGLETON, Mr. EVANS, Mr. EXON, Mr. FORD, Mr. GLENN, Mr. GORTON, Mr. HART, Mr. HEINZ, Mr. HOLLINGS, Mr. HUDDLESTON, Mr. INOUYE, Mr. JOHNSTON, Mrs. KASSEBAUM, Mr. LAUTENBERG, Mr. LEVIN, Mr. MATHIAS, Mr. MATSUNAGA, Mr. MELCHER, Mr. METZENBAUM, Mr. MITCHELL, Mr. PERCY, Mr. PROXMIRE, Mr. QUAYLE, Mr. RANDOLPH, Mr. RIEGLE, Mr. RUDMAN, Mr. SARBANES, Mr. SASSER, Mr. SPECTER, and Mr. TSONGAS) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1984".

SEC. 2. (a) The matter preceding clause (1) of section 901(a) of the Education Amendments of 1972 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any education program or activity receiving" and inserting in lieu thereof "by any education recipient of".

(b) Section 901(c) of the Act is amended by inserting "(1)" after the subsection designation and by adding at the end thereof the following new paragraph:

"(2) For the purpose of this title, the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

(c)(1) The first sentence of section 902 of the Act is amended—

(A) by striking out "to any education program or activity" and inserting in lieu thereof "for education"; and

(B) by striking out "such program or activity" and inserting in lieu thereof "recipients".

(2) The third sentence of section 902 of the Act is amended—

(A) by striking out "under such program or activity";

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" and inserting in lieu thereof "so found".

(3) Section 903 is amended by striking out "1002" and inserting in lieu thereof "902".

SEC. 3. (a) Section 504 of the Rehabilitation Act of 1973 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "his" and inserting in lieu thereof "such individual's";

(2) by striking out "in" the third time it appears;

(3) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(4) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of"; and

(5) by striking out "under any program or activity conducted".

(b) Section 504 of the Act is further amended by inserting "(a)" after the section designation and by adding at the end thereof the following new subsection:

"(b) For the purpose of this section, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

(c) Section 505(a)(2) of the Act is amended by inserting ", as amended," after "1964".

SEC. 4. (a) Section 302 of the Age Discrimination Act of 1975 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in programs or activities receiving" and inserting in lieu thereof "by recipients of"; and

(2) by striking out "programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)" and inserting in lieu thereof "recipients of funds under chapter 67 of title 31, United States Code".

(b) Section 303 of the Act is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits";

(3) by striking out "under, any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(c)(1) Section 304(a)(4) of the Act is amended by striking out "to any program or activity".

(2) Section 304(b)(1) of the Act is amended—

(A) by striking out ", in the program or activity involved";

(B) by striking out "operation" in clause (A) and inserting in lieu thereof "operations of the recipient"; and

(C) by striking out "of such program or activity" in clause (A) and inserting in lieu thereof "in furtherance of which the Federal financial assistance is used".

(3) Section 304(c)(1) of the Act is amended by striking out "any program or activity receiving".

(d)(1) Section 305(a)(1) of the Act is amended by striking out "under the program or activity involved".

(2)(A) The second sentence of section 305(b) of the Act is amended by striking out "the particular program or activity, or part of such program or activity, with respect to which such finding has been made" and inserting in lieu thereof "assistance which supports the noncompliance so found".

(B) The third sentence of such section is amended to read as follows: "No such termination or refusal shall be based in whole or in part on any finding with respect to any noncompliance which is not supported by such assistance.".

(3) Section 305(e)(1) of the Act is amended by striking out "Act by any program or activity receiving Federal financial assistance" and inserting in lieu thereof "title".

(e) Section 309 of the Act is amended by—

(1) by striking out "and" at the end of clause (2);

(2) by striking out the period at the end of clause (3) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding at the end thereof the following new clause:

"(4) the term 'recipient' means—

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

SEC. 5. (a) Section 601 of the Civil Rights Act of 1964 (hereafter in this section referred to as the "Act") is amended—

(1) by striking out "in" the second time it appears;

(2) by striking out "the benefits of" and inserting in lieu thereof "benefits"; and

(3) by striking out "under any program or activity receiving" and inserting in lieu thereof "by any recipient of".

(b)(1) The first sentence of section 602 of the Act is amended by striking out "program or activity" each time it appears and inserting in lieu thereof "recipient" each such time.

(2) The third sentence of section 602 of the Act is amended—

(A) by striking out "under such program or activity" in clause (1);

(B) by striking out "to whom" each time it appears in clause (1) and inserting in lieu thereof "to which" each such time;

(C) by striking out "program, or part thereof, in which" in clause (1) and inserting in lieu thereof "assistance which supports"; and

(D) by striking out "has been so found" in clause (1) and inserting in lieu thereof "so found".

(c) Title VI of the Act is amended by adding at the end thereof the following new section:

"Sec. 606. For the purpose of this title, the term 'recipient' means—

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

Senator HATCH. At the outset, I would forewarn our witnesses that we intend to complete the hearing record on this issue as expeditiously as possible, in order to have it available when the full Senate considers this issue. Thus, we will require any corrections or additions to their statements be filed with the committee as quickly as possible following receipt of their transcripts. So we would ask all witnesses to do that.

Our first witness today will be Clarence Pendleton, Chairman of the U.S. Commission on Civil Rights. Mr. Pendleton will be accompanied by the staff director of the Commission, Linda Chavez and Mark Disler, general counsel.

We are very happy to welcome all three of you to our committee this morning. We look forward to hearing what you have to say about this.

STATEMENTS OF A PANEL CONSISTING OF CLARENCE M. PENDLETON, JR., CHAIRMAN, U.S. COMMISSION ON CIVIL RIGHTS; LINDA CHAVEZ, STAFF DIRECTOR, U.S. COMMISSION ON CIVIL RIGHTS; AND MARK DISLER, GENERAL COUNSEL

Mr. PENDLETON. Thank you for the acknowledgement of Mr. Disler.

Chairman Hatch, I am delighted to appear before you on behalf of the U.S. Commission on Civil Rights.

We believe that legislation overturning the narrowing effects of the *Grove City* opinion on title IX and other civil rights statutes should be passed by this Congress. The previous Commission closely followed the *Grove City* case and expressed support for broad coverage of title IX, as well as title VI, section 504, and the Age Discrimination Act. I am here to reiterate that view on behalf of the current Commission. The Commissioners adopted a general statement on March 28, 1984, concerning this matter, which I would like to submit for the record. I would like to focus on some of the points made in the statement.

Senator HATCH. Without objection, we will put that in the record.

[The following was received for the record:]

STATEMENT ON AMENDMENTS TO CIVIL RIGHTS STATUTES

The Commission believes that if Congress amends Title VI, Title IX, Section 504, and the Age Discrimination Act to provide for recipient-wide coverage under those statutes, Congress should further provide that: (1) as provided by current law, termination of Federal financial assistance be "limited to the particular political entity, or part thereof, or other recipient as to whom [a finding of noncompliance] has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found" (Section 602 of Title VI); and (2) the use of racial or gender guotas and similar preferential techniques is neither required nor permitted. In connection with the latter point, the Commission recognizes that there are recipients of Federal aid who are illegally discriminating today. The Commission reiterates its view that be vigorous Federal enforcement to bring such discrimination to a halt and that nondiscriminatory affirmative action techniques be implemented by such recipients. These techniques include expanded recruitment, counseling, training, and educational programs open to all, but targetted to increasing the numbers of qualified minorities and females eligible top participate in federally funded programs. Moreover, the Commission will continue to monitor federal enforcement of these statutes and undertake studies of discrimination issues that involve federally funded institutions.

In favoring the retention of the "pinpoint" termination-of-federal-assistance-provision, the Commission notes that it also favors the vigorous use of "other means authorized by law" (Section 602 of Title VI) to redress discrimination. For example, even where an agency would not be able to seek the termination of federal funds of a program, the agency should refer unresolved complaints to the Department of Justice for judicial enforcement, including injunctive and other appropriate relief.

The Commission further believes that if Congress amends Title VII, Title IX, Section 504, and the Age Discrimination Act in this fashion, Congress should consider the desirability and feasibility of providing for institution-wide coverage of recipients under other federal funding statutes that use "program or activity" language. The Commission reserves judgment of the efficacy of any particular bill to provide recipient-wide coverage until it has had the time to review the proposed legislation.

The Commission urges Congress to consider the following enforcement issues, among others, prior to the adoption of any legislation on this matter:

1. Whether an "intent" or "effects" standard should be used to determine violations under these statutes;
2. Whether these statutes should be used to interfere in any way with the use of tests or examinations, such as the Georgia Regents' Examination, solely because of their alleged disproportionate racial impact; and
3. Whether agency enforcement policies are uniform and consistent throughout the Nation, with assurances of procedural due process in the course of an investigation.

Mr. PENDLETON. First, with respect to the regulatory authority of funding agencies and the scope of private lawsuits, the Commission firmly supports broad, recipientwide coverage under title IX, title VI, section 504, and the Age Discrimination Act. Such coverage is important because Federal tax dollars should not support discrimination.

While the Supreme Court dealt only with title IX in *Grove City,* the phrase it interpreted, "program or activity," is a limitation common to title VI, section 504, and the Age Discrimination Act. Thus, it is appropriate to provide clarifying language in those three statutes, as well as title IX.

While I will not dwell on this point, the importance of adopting legislation overturning *Grove City* cannot be overstated. Participants in federally assisted institutions should not be left outside the protection of these landmark statutes.

The Commission believes that Congress should consider the desirability or providing institutionwide coverage of recipients under a variety of other Federal funding statutes that use program or activity language. It is important to understand that the Supreme Court's interpretation of program or activity is likely to be applied to the program or activity language in these other statutes as well.

Second, the Commission believes that the scope of an agency's remedial power should be retained as currently set forth in section 602 of title VI and section 902 of title IX. Presently, if voluntary compliance efforts fail, a Federal funding agency has two principal tools for obtaining compliance with these four statutes.

Under one approach, an agency may terminate its Federal financial assistance to a noncomplying recipient. The law currently states that such a fund termination must be "limited to the particular entity, or part thereof, or other recipient as to whom (a finding of noncompliance) has been made, and shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found." This is the so-called pinpoint termination provision and the Commission supports its retention. Fund termination is a drastic remedy, which denies Federal aid to participants at a federally funded recipient, as well as to the offending recipient itself. Fund termination should continue to be carefully limited.

The other remedial tool by which an agency enforces these civil rights statutes is, in the language of sections 602 and 902, through "other means authorized by law." Such means now include the agency's referral of a matter to the Department of Justice for judicial action. Federal funding agencies are able to use such "other means," including Department of Justice litigation, throughout the entire recipient.

Under the broad pre-*Grove City* approach, if a recipient received Federal aid only for one of its activities, the funding agency could have sought to eliminate prohibited discrimination in other parts of that recipient by referring the matter to the Department of Justice. The agency, however, could only seek to terminate its Federal aid to the recipient if the discrimination occurred in the particular activity funded by the Federal Government. The Commission approves this pre-*Grove City* enforcement scheme.

In conclusion, let me urge you, on behalf of the Commission, to restore the scope of these civil rights laws to their broad, pre-*Grove City* scope. At the same time, care should be taken to clarify how any bill, including S. 2568, should be enforced.

In turning to S. 2568, I must make clear that the Commission has not reviewed the specific language in this bill. Consequently, the Commission has not determined whether it achieves the objectives outlined in our March 28, 1984, statement. Our staff has looked at the bill, and has some preliminary thoughts and questions concerning it. I want to ask the Commission's staff director, Linda Chavez, to share with you some of the general points staff believes the committee should consider in reviewing S. 2568.

Thank you.

Senator HATCH. Ms. Chavez, happy to have your testimony.

STATEMENT OF LINDA CHAVEZ

Ms. CHAVEZ. Thank you, Mr. Chairman.

I am pleased to have the opportunity to present to you some of the issues identified by the Commission's staff in reviewing S. 2568. I will first express some general comments about the bill, and then I want to raise specific issues that need to be considered.

S. 2568 would amend not only title IX, but also three other crosscutting civil rights statutes. The Commission supports this general approach. We think it is crucial to bear in mind, however, that title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, section 504 and the Age Discrimination Act cover all federally assisted entities and programs.

The Congress, in amending these four statutes should consider how the language of the amended statutes would operate where funding programs, types of recipients, and their service and benefit delivery may be quite different from those in the traditional education setting

While the *Grove City* opinion involved a college recipient and student financial aid programs, there are hundreds of widely different funding programs administered by nearly 30 major Federal agencies, many different kinds of recipients, and many different services and benefits dispensed.

We stress this because we believe the Congress should take special care to be as clear as possible as to how the amended statutes would confer regulatory jurisdiction and provide the basis of private suits in a variety of circumstances, and how the fund termination power should be construed. A lack of such clarity in the current laws as to the meaning of the phrase "program or activity" has created the problem of narrow coverage that now must be corrected. Because these statutes encourage voluntary compliance, clarity in the scope of recipients' obligations is especially important.

Not only recipients in federally aided activities have an overriding interest in as clear a bill as you can produce. Moreover, there are numerous enforcement officials and Federal judges who need to be certain of the meaning of the laws they must enforce.

Our staff has tried to apply the statutes, as they would be amended by S. 2568, to a number of circumstances to determine how they would operate. In doing so, it appears that the bill might create some ambiguities in the scope of such amended statutes. If S. 2568 is adopted, we believe some of its language needs clarification so that congressional intent as to the scope of these statutes is clear. I would now like to discuss two general areas, coverage and fund termination.

How broad is the definition of recipient and what is the extent of a recipient's compliance obligations?

The bill's definition of "recipient" includes States, instrumentalities of States, and public agencies, including subunits of States. It is not entirely clear what entity would be the recipient in various circumstances. For example, if a State receives a categorical health grant for its health department, is the State government itself the recipient, thereby subjecting to the civil rights laws all activities of the State government, including the State prison system and State professional licensing activities?

Or, is the recipient the State health department? If it is the former, we are not aware that pre-*Grove City* coverage had ever been so extended in that fashion. If the entire State is covered under these circumstances, the regulations enforcing these statutes are also applicable to the entire State. These regulations use an "effects" test rather than the "intent" test, which is generally used under the Constitution in determining whether discrimination exists. The same coverage questions arise under block grant programs as well.

There is also a question of the scope of a recipient's compliance obligations. For example, under the broad coverage of title IX thought to exist prior to *Grove City,* all educational activities of a college would have been subject to title IX by virtue of the receipt of student financial aid and similar educational aid.

It is not entirely clear, however, that by virtue of receiving educational aid, a college's commercial activities, unrelated to the educational activities of the college but providing revenue to the college, would have been covered by title IX. Under S. 2568, such activities would seem to be covered.

Thus, a college's rental property, even if not occupied by students or faculty, would seem to be covered by title IX under the bill, in addition to the college's faculty housing and student dormitories.

Similarly, under the bill, it appears that educational aid to a college would also subject the college's noneducational, commercial activities, such as the renting of commercial or housing space to nonstudents and nonfaculty, to the requirements of title VI, the Age Discrimination Act, and section 504. In the case of section 504, for example, the requirement to make facilities accessible would appear to apply not only to dormitories and classroom buildings, but also to these other properties as well.

The bill draws its definition of "recipient" from existing agency regulations. Unlike the regulations, the bill's definition does not include the word "individual" or "person." The absence of the word "person" from the definition of recipient could reduce the scope of coverage of the statute.

If a person, not incorporated as business, or as another entity, and entirely unconnected with a recipient as defined by the bill, receives Federal financial assistance to conduct activities, those activities presumably are not covered by the bill. Because so much Federal aid is provided to entities falling within the bill's definition of "recipient," this omission may not have very much practical significance. Congressional intent with respect to such "persons" receiving Federal aid, however, should be clear.

While the bill's definition of recipient is modeled on definitions in existing regulations, it contains a potentially significant, additional clause not found in those definitions. S. 2568's definition of recipient includes entities "which receive[s] support from the extension of Federal financial assistance to any of its subunits."

What "receives support" means, is not altogether clear. It could be interpreted as referring only to funds. However, Senator Cranston, commenting on the bill, said that the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, "services."

For example, if a municipality's fire department receives Federal funds to build a fire station, clearly the fire department is covered. Does the municipal government "receive support" from the fire department? If the fire department performs routine checks on fire safety equipment in municipal buildings and puts out fires in municipal buildings, are those services to the municipal government sufficient to subject all of the municipal government's activities to the civil rights statutes?

If the municipality was able to spend on other activities the funds it would have spent on the fire department, would that support trigger coverage of the municipality's other activities? The answers to these questions may not be terribly significant where the municipality or other recipient is receiving a wide variety of Federal aid which would lead to wide coverage of the municipality in any event. But not all municipalities and other recipients necessarily receive such extensive Federal aid, and the answers to these questions may be important to them.

S. 2568 would amend title IX by forbidding sex discrimination by any "education recipient" of Federal aid. The precise scope of this phrase is not clear. The bill would clearly subject all of a college's educational activities to title IX upon receipt of Federal education aid, and the Commission supports such coverage.

Suppose, however, that a State prison is conducting a federally-funded vocational education program. Even after *Grove City,* such a program would be covered under title IX as it is written today. While we understand that the sponsors of S. 2568 wish to preserve title IX coverage of a prison's federally-funded educational activities, a goal which the Commission supports, the language of the bill does not necessarily achieve that result. A prison may not be readily identified as an "education recipient."

Conversely, does the receipt of any Federal education money at the prison subject all of the prison's activities to title IX? Other questions arise: Does the receipt of non-educational Federal aid to a prison subject the prison's educational activities—and other activities—to title IX?

Accordingly, we would urge that any legislation amending title IX carefully reflect Congress' intent in these areas.

Our purpose in raising these and other examples is to draw your attention to possible interpretations of the bill. Congressional intention about such coverage questions ought to be clear in the legislation so that agencies and courts enforcing the amended statutes, as well as recipients and beneficiaries, understand the obligations of these laws.

S. 2568 does not seek to amend any of the many categorical and block grant Federal financial assistance statutes prohibiting discrimination on the basis of race, color, national origin, sex, religion or creed or handicap—I wish to discuss the revenue-sharing stature separately—Unlike the four major crosscutting civil rights statutes, these statutes not only contain nondiscrimination provisions, often with the "program or activity" limitation, they distribute Federal aid. It is likely that courts will treat the "program-specific" language in these statutes as narrowly as the Supreme Court did in *Grove City.*

Moreover, there is a doctrine of statutory construction that suggests that a more specific enactment controls the interpretation of coverage even when a more general enactment has also been adopted. There are other doctrines of statutory construction that might lead to the opposite result.

Accordingly, unless Congress clarifies the relationship between the four civil rights statutes and the civil rights provisions of these funding statutes, there is a risk that courts and others might defer to the narrower provisions in the funding statutes themselves.

If Congress makes clear that the scope of the four cross-cutting statutes, as amended, supersedes the civil rights scope of the individual funding statutes that contain "program or activity language—putting aside the Revenue Sharing Act—"any potential inconsistency between them will probably be substantially reduced.

Even if such clarity is achieved, however, S. 2568 will not restore protections against sex discrimination and religious discrimination contained in some funding statutes to the broad scope thought to exist prior to *Grove City*. Title IX only covers education recipients; even at recipients such as prisons, it presumably covers educational activities.

But, a funding statute with a "program-specific" ban on sex discrimination that provides Federal aid to a recipient that conducts no educational activities will likely remain subject to the narrowed interpretation of *Grove City* even if S. 2568 is adopted.

For example, the Federal Water Pollution Control Act of 1948, as amended in 1972, prohibits sex discrimination in programs funded under its authority. This prohibition against sex discrimination under the pre-*Grove City* broad approach would have covered the entire recipient.

The Supreme Court's narrower interpretation of "program or activity" seriously jeopardizes such recipientwide coverage under that act. Amending title IX will not rescue this and other statutes providing Federal aid to noneducation recipients when those statutes have program-specific limitations in their antisex discrimination clause.

Moreover, S. 2568 does nothing to restore recipientwide coverage of those provisions in funding statutes which prohibit religious discrimination. For example, the Full Employment and Balanced Growth Act of 1978 forbids religious discrimination in programs funded under the act.

I also wish to draw your attention to the potential impact of S. 2568 on the revenue sharing program. That program provides virtually unrestricted Federal money to local governments for use as they see fit. The nondiscrimination provision in the revenue sharing statute contains a program—specific ban against discrimination on the basis of race, color, national origin and sex. It also incorporates by reference the Age Discrimination Act and section 504.

Moreover, the provision also contains the following language: the prohibitions against discrimination in this statute "do not apply when the [local] government shows, by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity." This amounts to a "rebuttal presumption;" in other words, it is presumed that the entire locality is covered under the revenue sharing program unless it can demonstrate that revenue sharing funds were not used in particular activities.

Accordingly, prior to *Grove City*, if a locality spent its revenue sharing funds only to build a park, and could show that the payment was not used for anything other than a park, only its park and recreation department would be covered by the civil rights laws.

Under S. 2568, would this "rebuttable presumption" be available to a locality? As a practical matter, eliminating the rebuttable presumption under the Revenue Sharing Act may not have a substantially broadening effect on civil rights coverage because local governments undoubtedly receive other forms of Federal aid.

Nevertheless, if the rebuttable presumption is effectively eliminated it is likely that some—perhaps many—local governments would find more of their activities covered by the civil rights provisions than was the case even before *Grove City*.

Indeed, a locality receiving revenue-sharing funds without the availability of the rebuttable presumption might find, for example, its licensing activities—for various occupations and the like—subject to the Federal civil rights statutes where they had not been so subject before *Grove City*. Here again, the significance is that the Federal regulations enforcing these statutes apply an "effects" test, rather than the "intent" test generally used under the Constitution in determining whether discrimination is occurring.

I also want to mention briefly some concerns about the fund termination provisions in S. 2568. The bill would change part of the pinpoint termination provisions by limiting the "effect [of the termination] to the particular assistance which supports [the] noncompliance * * *."

Here, again, the meaning of "supports" is crucial. Unless clarified, this language could be interpreted to either broaden or reduce the scope of an agency's fund termination power. Neither result is favored by the Commission.

Once the principle is established that Federal aid to one part of the recipient subjects the entire recipient to coverage, the statutes' fund termination clauses, as amended by the bill, could be read to mean that all aid at a recipient "supports" any noncompliance at the recipient. This is particularly true if one views the receipt of Federal aid as "freeing up"—or "releasing"—the recipient's own funds to be used elsewhere by the recipient. If the enforcers of the statute take this approach, the termination power could be broadened.

On the other hand, if "support" is defined narrowly, an agency might be required to terminate some, but not all, of the Federal aid to the part of the institution which was found to be in noncompliance. Let me give an example to show both possibilities.

Suppose a school district receives Federal aid for its elementary and secondary school programs. Suppose, further, it receives Federal funds for a separate evening program of adult education. If the agency finds that there is a title VI violation in the adult program because it attempts to recruit only white participants, is all Federal aid to the school district to be cut off?

Instead, could only Federal funds to the adult education program be terminated? Or, could the agency cut off only that portion of the Federal aid used to "support" the discriminatory recruiting effort?

The first option, we believe, is probably broader than pre-*Grove City* enforcement policies, and the third option is probably narrower than those earlier enforcement policies Clarity as to the extent of the termination power is important in the overall enforcement scheme.

To reiterate, we believe that the scope of such terms as "education recipient," "recipient," entity "which receives support from the extension of Federal financial assistance to any of its subunits," and the termination power must be clarified.

Thank you.

Senator HATCH. Well, thank you.

I have a few questions for any of you, any of the three of you. So feel free to interrupt each other, and me, as well.

Is it my understanding then that, while the Commission has indicated its support for overturning the narrow effects of the *Grove City* decision, the Commission has taken no position with regard to this specific legislation?

Mr. PENDLETON. That is correct, Mr. Chairman.

Senator HATCH. At this point?

Mr. PENDLETON. It will be coming before us soon, just a matter of how you can get the information out to the Commissioners, and they will be able to collect the thoughts and come to some agreement as to how we can get about the legislation.

Senator HATCH. Could you describe for us the distinction between the so-called intent and effects test idea of discrimination with regard to discrimination, and the extent to which the courts have interpreted each of the four statutes involved here, to incorporate one or the other definitions of "discrimination"?

Mr. DISLER. Mr. Chairman, with respect to the difference between the two standards, the Court——

Senator HATCH. I see this as one of the major civil rights conflicts in America for the next generation whether we should have the intent test to prove discrimination, or whether the effects or the results test.

Mr. DISLER. The Court has determined that under the 14th amendment's equal protection clause, the standard for determining whether discrimination occurred is an intent standard—whether or not the action, or the failure to act by the party in question was motivated by a discriminatory purpose.

The effects standard would look to a disparate impact upon a particular group.

Senator HATCH. It would look at statistics?

Mr. DISLER. It would look at statistics, for example, and if the statistics show a sufficiently disproportionate impact, it would shift the burden to the party undertaking the action which caused the disproportionate impact, to justify the action that it took.

The effect standard would look, for example, to see whether or not there might have been a means that they could have used to achieve their objectives, that would have caused less of an impact on a particular group.

Senator HATCH. That is whether or not there was any intent to discriminate.

Mr. DISLER. That is correct.

Senator HATCH. Under the effects test, as I understand it, the way you have described it, a person or a community might be branded a discriminator even though there was never any intent or purpose to discriminate.

Mr. DISLER. Under the effects standards, and under the regulations of these statutes that are the subject of the bill, which use the effects standard in the regulations, yes, that is correct, that is my understanding of it.

Ms. CHAVEZ. I would just like to add to that the example that we used about licensing authority. If the State government, for example, has certain licensing procedures which may require a test, for example the bar exam would be one example of such a test, if that exam did produce disparate results for minority persons or women, for example, we question whether or not under this bill that that exam would be subject to the effects test and therefore have to be eliminated.

Senator Hatch. I see.

Mr. Pendleton?

Mr. Pendleton. Mr. Chairman, just another comment.

In terms of the broad consideration of effects versus intent, it seems to me that the question—the point that you raised about it being crucial in the future, is a very important point.

As we increased the number of classes requiring protection, it seems to me that the effects test can be considered by various groups as having an effect upon their civil rights, and it seems to me that one has to consider whether intent is more important than effects.

From a personal point of view, I am one who believes more in the intent test than the effects test.

Senator Hatch. I see.

Mr. Disler, if you could answer the latter part of my question, which is how are these two approaches, the intents test versus the effects test, applied to the laws involved—to the four laws involved in this particular piece of legislation before the U.S. Senate?

Mr. Disler. OK. The regulations enforcing all four statutes, throughout the executive branch, throughout the Federal agencies, use effects language. Sometimes the regulations say "purpose or effects," but they clearly incorporate the effects standard.

Now, the Court has ruled on title VI, in the Guardians case, and it concluded that title VI itself, the statute, incorporates an intent standard, but an agency regulation that uses an effects standard is acceptable, because it is reasonably related to effectuating the title VI statute.

So while the statute itself has been interpreted to mean an intent standard, the Court has permitted agencies to use an effects standard to implement it.

Senator Hatch. Under certain circumstances.

Mr. Disler. Well, at least under certain circumstances, yes.

Now, the Court has a section 504 case that raises the intent issue, I think that is the *Jennings* case, *Alexander* v. *Jennings,* and I do not know how it is going to rule. Courts have generally treated similar questions under these three or four statutes similarly, so that one might expect that title IX and section 504 might be deemed to be an intents statute, with effects regulations permissible thereunder, or, the Court may decide to treat the interpretation of section 504 differently.

Senator Hatch. It is presently somewhat unclear what the law really is, and how it is going to apply.

Mr. Disler. With respect to title IX, section 504 and the Age Discrimination Act, the Court has not ruled on that. They may rule shortly on the section 504 issue.

Senator Hatch. Let me ask this question. Under S. 2568, if the larger unit—say a State government, for example, receives $1 in Federal assistance, what is the standard for determining whether the smaller units, that is, the localities, are also subjected to the same Federal rules and regulations?

This relates to the so-called trickle down theory that I think you were referring to, Mr. Chavez, in your comments earlier.

Mr. DISLER. Well, if the State received $1 of aid, what would the standard be in terms of—well, it is a little hard to respond to that in such general terms. I think it might turn on whether or not the locality, for example, is receiving financial aid or other assistance from that part of the State government, which is receiving the Federal aid itself.

Senator HATCH. So if it trickles down to the lesser locality——

Mr. DISLER. But that is partly the case, even without the bill today. At least the way it has been interpreted.

Senator HATCH. Would the subunits—excuse me, Ms. Chavez?

Ms. CHAVEZ. I guess, Mr. Chairman, I would like to add that with respect to all of these questions we raised, our intention here is not to come out with a position either for or against some of the effects that this legislation would in fact entail.

What we want to do is make sure that the Congress itself understands and knows what effects the language would have, and that the Congress is as clear as possible in the actual writing of the statute.

So that if in fact this trickle down theory that you are describing is the intention of the Congress, then that ought to be clear, and if it is not the intention of the Congress, then that ought to be clear, as well.

Senator HATCH. You are saying the bill as presently drafted is not clear?

Ms. CHAVEZ. It is not clear. There are many ambiguities in the bill, and I think what we have done is outlined four or five areas where those ambiguities exist, and what we would like to see is that the legislation that comes out, either through the language of the legislation itself, or in the legislative history, reflect Congress' intention, because that is how we got into the Grove City situation in the first place.

Senator HATCH. Well, the bill itself says, for the purpose of this title, the term "recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution or organization, or other entity, including any subunit of any such State, subdivision, instrumentality, agency, institution, organization or entity.

In other words, it looks to me as though it covers every subunit of State and local government?

That leads to my next question. What happens if the dollars are contributed to the subunit? Do they trigger coverage of the State?

Ms. CHAVEZ. That is the trickle up theory.

Senator HATCH. So you are saying it could apply either way.

Ms. CHAVEZ. Yes, that is right.

Senator HATCH. Either dollar could trigger complete Federal coverage in this area, could trigger the applicability of the full force and effect of this particular statute?

Mr. PENDLETON. In the area of subunits, one must consider, like in California, and some other areas, which have special purpose districts, it could mean that some special purpose district has $1 in Federal money, and it accelerates trickle up theory, which could be demonstrating in some of the outlying areas, certainly.

Mr. **Disler**. Mr. Chairman, the trickle up—the so-called trickle up theory is, I think, largely derived from the very last clause of the definition of recipient throughout the bill, "or which receives support from the extension of Federal financial assistance to any of its subunits," that clause. That clause is not one which appears in agency regulations in defining recipient.

Senator **Hatch**. That could trigger broad agency regulations.

Mr. **Disler**. The potential is there, depending on what it means, and what "receives support" means, and I think the staff director's testimony gave an example of a fire department, for example.

Senator **Hatch**. Well, under S. 2568, if the smaller unit, say a locality, for example, receives $1 in Federal assistance, what would be the standard for determining whether another smaller unit, that is, another locality, is also subject to the Federal rules and regulations. This again relates to the joinder of the trickle down and trickle up theories.

Mr. **Disler**. I am not so sure——

Senator **Hatch**. There may be a conjunction of both.

Mr. **Disler**. Well, I am not so sure that if one locality receives some aid, another locality is necessarily implicated by a trickle up or trickle down theory. It would depend on the aid, what the relationship is between the State and the municipality, I mean, it is a real tough question to answer in the abstract.

There may be potential for that kind of connection, but the concerns that we had expressed in the testimony went to issues that related, for example, within the municipality—for example, the fire department example. It is my understanding of the broad approach before *Grove City,* if the fire department received aid from the Federal Government, it was only the fire department in its entirety which was covered under the broad approach.

The potential, with the trickle up theory, is that everything that that municipality does might be covered, depending on what "receives support" means. Whether or not another locality is covered, is something that I have not looked at too closely. It is something that we might want to respond to in writing, perhaps.

Senator **Hatch**. Ms Chavez?

Ms. **Chavez**. But if in fact the receipt of that aid does free up other money for the State government, it would appear that that trickle up theory would apply.

Senator **Hatch**. So you are saying if you had a trickle down and a trickle up theory, that many of the proponents might argue this theory?

Ms. **Chavez**. That is right.

Senator **Hatch**. There are no conceptual limits?

Ms. **Chavez**. Particularly——

Senator **Hatch**. Is that not one of the major issues?

Ms. **Chavez**. Particularly if it freed up other money. If the receipt of Federal aid to one locality freed up other money, to go to another locality, then I would—by the State government, than perhaps that would trigger the trickle-up theory.

Senator **Hatch**. Well, the argument will always be that it does free up other money, because the very fact alone that it comes into that community indicates that it frees up money that would have to otherwise be spent for that same purpose.

Ms. Chavez. That is certainly a possible interpretation under the way the bill is currently written.

Senator Hatch. It certainly would be litigated.

Mr. Pendleton. I guess to be specific about that, where you have more than one municipality in a joint powers agreement to receive Federal dollars, I think certainly that would trigger off the situation that you are talking about, that it would be more than one unit involved in the use of those Federal dollars.

Senator Hatch. If one branch of a State university received $1 dollar in Federal assistance to its biology department, for example, would every other branch of the university be covered, and would it be covered with respect to both its academic and its nonacademic functions?

Mr. Pendleton. Yes.

Senator Hatch. You are all in agreement on that?

Ms. Chavez. Yes.

Mr. Disler. Yes. I think that the import of using the term "education recipient" is clearly that everything the recipient does would be covered, including what we have called the noneducational commercial activities. So long as it is run by the university, the scope of the bill would cover that, I think I am quite comfortable in so concluding.

Ms. Chavez. And again to reiterate, under the pre-*Grove City* interpretation, if an institution rented commercial property, and that was not used for faculty housing, or student housing, we do not believe that there was any interpretation which covered that commercial activity, but under this new bill we believe that that commercial activity would in fact be covered, and that is going beyond the pre-*Grove City* coverage.

Mr. Disler. I think that is one of the areas of the bill which is fairly clear, frankly, that it would in fact cover that kind of activity, at least on its face. I mean if there is an intent to do otherwise, it is not clear from the statute, because once you use the word "recipient," if Georgetown University is the recipient, and it has property in Ohio, that somebody willed to it, from which it derives income, and which it controls and operates, it would seem to me that that property in Ohio was covered, because Georgetown is a recipient.

Senator Hatch. Well, you have indicated, Ms. Chavez, and you have implied, Mr. Pendleton, that in the case of revenue sharing each of the aspects of the covered laws plus any accompanying rules and regulations might be applicable to recipient jurisdictions.

One of the things that most people who love revenue sharing love the most is that there are very few Federal strings attached to revenue sharing, and that State and local governments are entitled to do basically what they feel is best with these funds.

I would like you to define that just a little bit further and tell me just what does this bill does in that area?

Mr. Disler. The Revenue Sharing Act, in my opinion, is a special case under this bill. It is very, very difficult to tell exactly what the bill would do to the Revenue Sharing Act's antidiscrimination scope. Because what you have under the Revenue Sharing Act right now is really sort of a three tier situation.

In the first place, there are program specific prohibitions against discrimination, for example, I think on the basis of race. The Revenue Sharing Act then incorporates by reference section 504 and the Age Discrimination Act.

Therefore, if this bill broadens the scope of section 504 and the Age Discrimination Act, it will have been incorporated into one of the provisions of the antidiscrimination part of the Revenue Sharing Act, but then the Revenue Sharing Act goes further, and permits a locality to say, if it only uses the revenue sharing funds for a particular program, or a particular activity, the rest of its activities are not covered. There is a risk that that rebuttable presumption, as it has been described, would fall if this bill is adopted it is very difficult to try and discern the relationship between the statutes, the four cross-cutting statutes, as they would be amended by this bill, and a statute like the Revenue Sharing Act

The bill might very well remove that rebuttable presumption, and I can say comfortably, that if that presumption is taken away, then it would clearly broaden coverage beyond that which existed under the broad interpretations before *Grove City*, because the presumption is written—the rebuttable presumption is written right into the revenue sharing statute. The rebuttable presumption is specifically aimed at narrowing coverage, because the revenue sharing funds do go as unrestricted money to the city.

Senator HATCH. What is your impression as to what would happen?

Mr. DISLER. Well, personally, my own view is, without the Commission having looked at it, I can tell you my own view, that the rebuttable presumption would disappear.

Senator HATCH. In other words, it would bring Federal rules and regulations more deeply into all aspects of Federal revenue sharing?

Mr. DISLER. It would bring those rules and regulations under the civil rights statutes throughout the municipalities' activities, if they receive revenue sharing funds, and the reason why I say that, is in part, I have noticed some statements——

Senator HATCH. Well, that is not done today.

Mr. DISLER. Pardon me?

Senator HATCH. You are saying that is not done today. It never has been?

Mr. DISLER. No, that is not the case today. The Revenue Sharing Act specifically permits a locality to show that it is using revenue sharing funds only in a particular way, and only that activity would be covered.

For example, if a locality receives revenue sharing funds, and builds a park, the park department would be covered. But the locality would be able to show that the revenue sharing funds went to the park, and nowhere else, and would be able to limit the coverage as a result of the revenue sharing funds, to the parks department.

Senator HATCH. If your impressions are correct, then what this suggests is that this particular bill goes far beyond a simple overrule of the *Grove City* case.

Mr. DISLER. With respect to the Revenue Sharing Act, and what I believe to be the impact of the bill on that act, the answer to that would be, in my opinion, yes.

Ms. CHAVEZ. But there are provisions where the bill, as we currently have it, does not go as far as the pre-*Grove City* enforcement did, either. When you have specific provisions in funding statutes, which have the program-specific language in it, then this bill would do nothing, obviously, to effect those bills, and therefore we have not done anything in terms of the interpretation of those laws.

Senator HATCH. I take the definition of "individuals" as one indication.

Ms. CHAVEZ. And the definition of individuals is another, but in reference to specific funding statutes which have in them language which is narrower than this language, then that narrower language, the courts have always in the past interpreted to be the ruling language.

So in some ways you could narrow the provisions, and in other ways you could broaden them.

Mr. PENDLETON. Mr. Chairman?

Senator HATCH. Yes.

Mr. PENDLETON. From a policy point of view, as far as the Commission, I think we would be looking very carefully at the reach of this bill, and what it is doing now, in terms of—it is supposed to do in terms of the entanglement, or the intrusion of the Federal Government into State and local and private activities, and we would be very much interested in hearing from staff just how far this goes, and what they think the policy guidance would be that we would give to the Congress and to the administration.

Senator HATCH. It is the view of the Commission that this bill effects substantial changes in the status quo ante *Grove City*.

This apparently is a major area of disagreement between the Justice Department and the civil rights community. How do you account for this disparity?

Ms. CHAVEZ. Some of it, frankly, is a question of ambiguity in the bill, and I think we have tried to outline those areas where the language is ambiguous.

But clearly, as in the last example that we gave, it does appear that there would be a broadening effect, and in other instances a somewhat narrowing effect, so we do not believe that—at least the staff analysis would suggest that the language, as it is currently drafted, does not simply return us to the state of affairs before the *Grove City* decision.

Senator HATCH. The subject of religious discrimination is within the Commission's scope of authority.

The CHAIRMAN. Mr. Chairman, could I interrupt?

Senator HATCH. I would be happy to——

The CHAIRMAN. I am catching a plane to go out of town, and I just wanted to ask unanimous consent to put an opening statement in the record, following your statement.

Senator HATCH. Without objection, we will place that in the record.

Thank you, Senator. I appreciate your being here.

Several religious organizations have indicated concern that the partial religious exemption in the title IX regulation is so narrow that it is ineffective in protecting the legitimate interests of religiously-oriented institutions.

For example, if the Catholic-oriented school received $1 in assistance for its physical education program, it would be required to abide by at least four separate provisions of title IX regulation, dealing with abortion policy, and non-discrimination against students wishing to secure abortions.

Do you see a legitimate concern here, that while we are eliminating the program-specific character of title IX, we are opening up areas of potential difficulty for religiously oriented schools?

Mr. DISLER. That is something we have not looked at, Senator, but I understand the point you are making, one of the things I would stress, that Ms. Chavez had mentioned a moment ago in the testimony, the protection against religious discrimination is really left out of the bill before us.

The situation she was mentioning is this, that there are a number of funding statutes which contain bans on religious discrimination, and they use the program or activity language. Unless that language is broadened in those funding statutes, the way it may be broadened in the four crosscutting statutes, it is probably going to be continued to be interpreted in the same way that the Supreme Court interpreted title IX, which is narrowly.

So that the protection against religious discrimination will probably be left the way it is, in light of *Grove City*, that is to say probably narrow, even if this bill is passed. It does nothing to expand the religious discrimination provisions to institutionwide or recipientwide coverage.

Senator HATCH. But again that is an ambiguity?

Mr. DISLER. No; I do not think that is an ambiguity at all. I think that, with all due respect, I do not think that the bill achieves it, period. I do not think the bill addresses religious discrimination, whatsoever, and the other point, too, and we made it—the Staff Director made it in her testimony, even the protection against sex discrimination is not restored to its pre-*Grove City* breadth by this bill, and the reason for that is, title IX, however broadly it is interpreted, applies to educational activities and programs, or educational institutions and settings.

There are some funding statutes which provide money, which in no sense are going to educational programs, like, for example, the Water Pollution Control Act, that we have mentioned in the testimony. That act contains an antisex discrimination provision limited to programs or activities receiving aid under that statute. Amending title IX to provide recipientwide coverage, under title IX, will do nothing to broaden coverage, in my opinion, under that funding statute, the pollution control funding statute.

So, even with respect to the antisex discrimination provisions, I do not believe the bill successfully achieves pre-*Grove City* broad coverage with respect to sex.

Senator HATCH. Is it true that Federal aid to secular programs of a religious-oriented institution also triggers, under this bill, coverage of that institution's nonsecular programs?

Mr. DISLER. Well——

Senator HATCH. The answer to that is "yes"?

Mr. DISLER. The answer to that is—it would seem, and I have not studied that question, but it would seem, on its face, that it would do that.

The only thing that I would mention——

Senator HATCH. Do you agree, Ms. Chavez?

Ms. CHAVEZ. Yes; I think it would appear that it would.

Mr. PENDLETON. Yes, sir; I think so.

Mr. DISLER. Let me mention one thing.

There is an exemption for some kinds of religious institutions that would not be touched by the bill, those are ones which are controlled by religious organizations, ones that are religious-oriented, however, would probably fall outside that exemption, and therefore would be subject to the concerns that you have expressed. I think it is true that if a private school receives money, whether it is religious or not, unless it falls within this exemption, under the bill it is treated the way any other recipient is.

Senator HATCH. Well, I would hasten to point out, that many religious institutions are not "controlled" pursuant to those provisions, and there are some which are.

Mr. DISLER. Yes. I understand that.

Senator HATCH. What is the overall perspective of all three of you on S. 2568, from an administrative and enforcement perspective.

You have addressed that to a degree, Ms. Chavez. Do you see any potential, for duplication or overlap of various Federal agencies with civil rights responsibilities?

Mr. Pendleton?

Mr. PENDLETON. Mr. Chairman, I do not think we know who will have trumpets in this case to blow, in case something is wrong. I think there is an overlapping of enforcement responsibilities.

I think there are staggering costs, bureaucratic costs, as well as costs to institutions to comply, and I think we have yet to touch that issue, as much as we would like to, and certainly the Commission wants to look at that, and I am certain that they will.

I just see a nightmare of enforcement regulations, again, overlapping, I also begin to look at how the recipients come into compliance.

Is there a matter of cross compliance, with whom does that recipient sign off, and when you think of the long line of who may or may not be recipients, then I just see a paperwork situation that will overwhelm, I think, the bureaucracy.

Senator HATCH. Ms. Chavez?

Ms. CHAVEZ. Well, I would just add to that, that it is obviously, if there are any ambiguities in the law, when it comes time to promulgate new regulations, those ambiguities in the law will become terribly important, and likewise, when it is litigated, the ambiguity may also have a dramatic effect.

In terms of the enforcement agencies, there may, in fact, be some overlapping, if the bill is passed as it is, and I see that as an additional problem.

Senator HATCH. Let me just throw out one other question in this area.

What are the implications of this legislation for the pending Baby Doe controversy involving the applications of section 504 to hospitals receiving Federal medicare and other Federal assistance?

Mr. DISLER. Well, assuming that medicaid and medicare are Federal financial assistance—the only thing this bill would do is to enhance the possibility of covering a Baby Doe situation, because what it purports to do is to expand the scope of coverage. So I think that with respect to the Baby Doe situation, the bill—the only thing the bill could do would be to add arguments that that situation would be covered if the bill is passed.

Now, where the problem comes in with respect to Baby Doe, is whether or not section 504 was intended to cover that situation, and the courts have been very unsympathetic to that argument, and everyone who has ruled on it so far, has said "no."

Senator HATCH. But this statute could add weight to that argument.

Mr. DISLER. Well, the way I would look at it, is that the bill, with respect to the scope of coverage, could only, in my view, assist the argument that Baby Doe situations are covered, but what the bill could not do, does not purport to do, is to address the substance of what section 504——

Senator HATCH. It is not clear?

Mr. DISLER. Well, with respect to—to the extent that it does not specifically address the Baby Doe situation, I suppose you could say it is ambiguous, but that really goes, I think, Mr. Chairman, to a wholly different question, which is what the substantive requirements of these laws mean, even today.

The scope question under section 504 is a different one, in my opinion, than the substantive meaning of section 504, and it may be that if the courts are ruling Section 504 presently does not cover the Baby Doe situation, I do not think it has been because of the scope question, as much as it has been on the grounds section 504 was never intended substantively to cover that kind of a problem. The way to get at that substantive coverage problem, if that is the way the courts are coming down, would be to address that specifically in legislation, in my opinion.

Senator HATCH. It is my understanding that you were invited, Mr. Pendleton, to testify before the House Judiciary Committee on this issue, but chose not to do so. Can you give us any reasons for this?

Mr. PENDLETON. I did not choose not to do so, Mr. Chairman. It was that I, in checking my schedule in California, I had to attend a very important board meeting on May 16.

The Commission has some 30 precedents where the Staff Director has testified in the absence of the Chairman, and I requested that Ms. Chavez be able to deliver my testimony. That request was denied, denied on and after the date of May 16.

The other date, May 21, Ms. Chavez and I, along with Commissioner Buckley, were attending a State Advisory Committee meeting that was prearranged, in Denver, CO, and could not testify.

We did, on the May 17 date, send our testimony with an accompanying letter, to the committees on the House side. I regret that the committee saw fit not to honor the presence of the Staff Director, which has been honored before, and would hope that in the future that the committees, or any committee, would certainly honor a chairman's request to have the staff person testify.

Senator HATCH. I did not know the reason.

Ms. Chavez, just one last question to you.

As I listened to your statement, it suggested to me that this will create a great deal of Federal Government intrusion into State and local affairs that had never before existed.

Am I misconstruing your statement, or is that correct?

Ms. CHAVEZ. I think that our statement says that in fact the way the bill is written now, is in some instances, particularly in the definition of recipient, ambiguous, and that it could in fact include an extension of the Federal Government into areas where it has not been, at least not in the pre-*Grove City* enforcement.

Senator HATCH. With respect to this bill, would it be your impression that increased litigation will be generated?

Ms. CHAVEZ. Well, as I said earlier, I think that whenever a bill is—the language of a bill is unclear, it causes problems in the courts, and what I would not like to see is to have this issue again be settled in the courts as it was previously.

I think that it is incumbent upon the Congress to try and write as clear a bill as it can, in order to avoid confusion in the interpretation, and it should not defer—the Congress should not defer its responsibilities to the courts.

Senator HATCH. Thank you.

I want to thank all three of you for taking the time to appear before us. We have appreciated your testimony, and certainly look forward to having any additional information that you can get to us within the time limits, and time constraints that I have.

Anything else you would like to submit to us will be entered into the record.

Thank you so much for being with us.

Mr. PENDLETON. Thank you, Senator.

Senator HATCH. Our next group of witnesses will appear as a panel.

Bruce Hafen, president of the American Association of Presidents of Independent colleges and Universities, and president of Ricks College; Charles MacKenzie, president of Grove City College; and Mr. George Roche, president of Hillsdale College.

I want to welcome all three of you to the committee; we are very happy to have you here and since all three of your colleges could be affected by this legislation, we are particularly interested in obtaining your perspectives as to this particular legislation.

Dr. Hafen, we will begin with you—let us go with you, Dr. MacKenzie.

STATEMENTS OF A PANEL CONSISTING OF CHARLES S. MacKENZIE, PRESIDENT, GROVE CITY COLLEGE; BRUCE C. HAFEN, PRESIDENT, AMERICAN ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AND PRESIDENT, RICKS COLLEGE; AND GEORGE ROCHE, PRESIDENT, HILLSDALE COLLEGE.

Mr. MACKENZIE. Mr. Chairman, as president of Grove City College, I have been reluctant to appear today, simply because I would much rather be attending to the educational needs of our 2,200 students at Grove City College.

However, because of our concern about the pending litigation, and also because of our admiration for you, Senator Hatch, we are here to share our thinking on the bill that is being proposed.

I have read the prepared testimony of the supporters of S. 2568. I was very much concerned because they appeared to question the motives for Grove City's challenge to title IX. They seemed to assume that Grove City, and anyone else who does not agree with the regulatory scheme for enforcing the civil rights policies, was somehow soft in their commitment to nondiscrimination.

Grove City is as committed to the principles of nondiscrimination as the sponsors of these bills. Long before the passage of title IX, or any other Federal nondiscrimination law, Grove City held the policy that discrimination, on whatever basis, was morally repugnant to its principles.

Grove City had no desire to fight the Government. We are loyal flag-waving Americans. But litigation was forced upon us, in our judgment, by HEW. Grove City entered the lawsuit, which eventually ended in the Supreme Court decision in February, because it saw its deeply held ideals of economy and self-sufficiency threatened by Government actions, which imposed far-reaching regulatory obligations, based on the most gossamer of connections—the Government's attempt to base institutionwide regulation on the single fact that some Grove City students received BEOG or Pell grants.

When our Government was established in 1789, Federal power was in the main limited to foreign affairs, defense, and the maintenance of law and order. Conduct of daily affairs was the responsibility of the citizenry. This concept of what Government should be has drastically changed, especially in recent years, so that now the Federal Government considers that it can intrude in many ways into our daily activities.

Grove City believes that should all higher education come under control of the Federal machinery, it will signal not only a change in the nature and quality of education, but also a change in Government itself. Once the Government secures a foothold, limiting further intrusion is virtually impossible.

Think, for example, when Congress promised worried educators in the National Defense Education Act of 1958: "This section states that nothing contained in the Act will be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration or personnel of any educational institution." That was a promise made in 1958.

Yet the intervening years have shown that, in spite of Congress' best intentions, the Federal presence has been more and more involved with every aspect of education.

Contrary to what a number of people have said, the *Grove City* case did not involve a violation of anyone's civil rights. Indeed, the Government agencies themselves agreed that discrimination was not at issue in the *Grove City* case.

In the words of the HEW administrative law judge:

> There was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief.

Similarly, as Justice Powell wrote in his concurring opinion in *Grove City*:

> The undisputed fact is that *Grove City* does not discriminate. This case has nothing whatever to do with discrimination, past or present.

So far as Grove City is concerned, this case has involved only its attempt to avoid entanglement with the Federal Government.

You should know that Grove City has decided, and announced to incoming students, that it will no longer matriculate students who receive Pell grants. We have taken this step very reluctantly, because we know it will cause hardship to some students, and perhaps force others to forgo postsecondary education entirely.

The college, however, will attempt to enlarge its scholarship program, but we are particularly concerned about the effect of our decision on needy students, including minorities, who have relied on Federal aid for their education. Nevertheless, we are convinced that this decision is essential if we are to maintain our autonomy and independence.

This decision does not mean that the Grove City College will change its policy of nondiscrimination. We are pledged to continue that policy, but we fear that this proposed legislation is but another step preventing Grove City College and others like it from maintaining its freedom from Government entanglement.

The bill's definition of "recipient" is so far reaching that it could encompass forms of indirect need which were never previously believed to be within the scope of title IX. If this bill passes in its present form, we fear that we may never be able to disengage our college from the Federal Government.

Whatever steps we take to refuse Federal funds, or to deny admission to students receiving Federal moneys, someone, somewhere, will attempt to trace a Federal dollar to Grove City's treasury. If that is the case, then any meaningful distinction between private and public education will be lost. We will then have come to the point where private higher education institutions will lose their ability to remain independent, even if they so choose.

We believe that the Government's domination of private campuses will cause inefficiency of operation, stifle innovation, and limit freedom of thought and action. In place of the rich, diverse higher educational community which is the envy of the world today, a homogenous, value-neutral, Government-dominated network of colleges and universities could result.

This legislation, we believe, is a giant step in that direction.

Our plea then is for the Congress to find some other way to eradicate discrimination, without destroying the autonomy of private colleges and universities by designating them recipients of Federal assistance. The present bill, unfortunately, in our judgment, goes a long way toward subjecting every college or university to Government domination.

As the Washington Post has recently said, at a very minimum the bill requires close scrutiny and careful attention of the issues raised by Grove City, and by others testifying about this legislation.

Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Mr. MacKenzie.

We appreciate your being here. You make some very important points, I think, that perhaps have not been made in this debate thus far.

[The following was received for the record:]

PREPARED STATEMENT OF CHARLES S. MACKENZIE

I welcome this opportunity to testify here today for a number of reasons. First, I am anxious to clarify any misconceptions about Grove City and its motivation for bringing the lawsuit which has led to these hearings and the bill now under consideration. Second, Grove City shares the concern expressed by so many that the civil rights laws be actively enforced. Finally, however, I am here to tell you that the current bill does not solve the problems that have been identified following the Supreme Court decision, and, indeed, creates far graver ones.

In preparation for today I read the prepared testimony of the supporters for S. 2568. I was disturbed because they appeared to question the motives for Grove City's challenge to Title IX. They seemed to assume that Grove City, and anyone else who does not agree with the regulatory scheme for enforcing the civil rights policies, was somewhat "soft" in their commitment to nondiscrimination. Grove City is as committed to the principles of nondiscrimination as the sponsors of these bills. Long before the passage of Title IX or any other federal nondiscrimination law, Grove City held the policy that discrimination, on whatever basis, was morally repugnant to its principles.

Grove City College was founded in 1876 as a co-educational institution of higher education. Today, it is a four-year college of liberal arts and sciences serving over 2,000 students, half of whom are women. The College follows an unyielding policy of refusing all forms of government assistance, be it federal, state or local.

We believe that Grove City has succeeded in its mission primarily because it has been able to maintain its independence from government funding and government control. One of the benefits of this independence has been low cost. Although endowment income and gifts to the operating budget contribute less than $250 toward the cost of educating each student. Grove City's 2,200 students pay less than $5,000 for tuition, room and board for the entire academic year. We have been able to maintain those costs because our administrative staff is small and we carefully manage our resources. The College has been able to experiment and innovate, free in the knowledge that it did not have to answer to a central educational authority. It has also been able to combine religious and moral values into its curriculum.

Grove City initiated the lawsuit which eventually ended in the Supreme Court decision in February because it saw these deeply held ideals of autonomy and self-sufficiency threatened by government action which imposed far-reaching regulatory obligations on the most gossamer of connections—the government's attempt to base institution-wide regulation on Grove City's students' receipt of BEOG (Pell) Grants.

When our government was established in 1789, federal power was in the main limited to foreign affairs, defense and the maintenance of law and order. Conduct of daily affairs was the responsibility of the citizenry. This concept of what government should be has changed, especially in the last 30 years, and it is now fair to say that it is generally accepted that the federal government intrudes in many ways into our daily activities. What was in 1789 a tiny number of federal employees has now grown into an enormous staff, often described as having a mind and soul of its own, with little willingness to accept direction even from Congress.

Grove City believes that should all higher education come under control of the federal machinery, it will signal not only a change in education, but ultimately a change in government itself. Once government secures a foothold, limiting further intrusion is virtually impossible. Think, for example, when Congress promised worried educators in the National Defense Education Act of 1958: "This section states that nothing contained in the act will be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution." Yet, the intervening years have shown that, in spite of Congress' best intentions, the federal presence has become involved with more and more aspects of education.

Contrary to what a number of people have said, the Grove City case did not involve a violation of anyone's civil rights. Indeed, the government civil rights agencies themselves agree that discrimination was not at issue in the *Grove City* case. In the words of the HEW Administrative Law Judge:

"[T]here was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief."

Similarly, as Justice Powell wrote in his concurring opinion in *Grove City*, "the undisputed fact is that Grove City does not discriminate. . . . This case has nothing whatever to do with discrimination past or present." So far as Grove City is concerned, this case has involved *only* its attempt to avoid entanglement with the federal government. My concern today is that in a rush to remedy what the Supreme Court did in its decision, this Congress will submerge the valuable principle which Grove City sought to air in its long and arduous battle with the government bureaucracy.

You should know that Grove City has decided, and announced to incoming students, that it will not matriculate students who receive Pell grants. We have taken this step very reluctantly, because we know it will cause hardship to some students, and perhaps force others to forego postsecondary education entirely. The College will attempt to enlarge its own scholarship program, but we are particularly concerned about the effect of our decision on needy students, including minorities, who depend on federal aid for their education. Nevertheless, we are convinced that this decision is essential if we are to maintain our autonomy and independence.

This decision does not mean that the College will change its policy on nondiscrimination. We are pledged to continue that policy, but we fear that the proposed legislation is but another step preventing the College from maintaining its freedom from government entanglement. The bill's definition of "recipient" is so far-reaching that it could encompass forms of indirect receipt which were never previously believed to be within the scope of Title IX. Although we do not expect that students' or their parents' receipt of direct federal entitlements will make a college a "recipient" of federal assistance, I believe there is real uncertainty as to the scope of the present bill. If this bill passes in its present form, we fear that we may never be able to go far enough to disengage the College from the federal government. Whatever steps we take to refuse federal funds or to deny admission to students receiving federal monies, someone, somewhere will attempt to trace a federal dollar to Grove City's treasury. If that is the case, then any meaningful distinction between private and public education will be lost. We will then have come to the point where private higher educational institutions will lose their ability to remain independent, even if they so choose.

We sympathize with the differing views of many senators today and with their desire to insure eradication of discrimination in education. We believe, however, that the current bill is both an overreaction to the Grove City decision and a potentially dangerous broadening of the scope of federal regulation.

We believe that the government's presence on private campuses will inevitably cause inefficiency of operation, stifle innovation, and limit freedom of thought and action. In place of the rich, diverse higher educational community which is the envy of the world, a homogenous, value-neutral, government dominated network of colleges and universities could result. This legislation is a giant step in that direction. The dynamic and creative competition which presently exists between public and private institutions will disappear if this Congress takes another step toward government jurisdiction over all of higher education.

Our plea is for the Congress to consider carefully the proposed legislation and to find some other way to eradicate discrimination without destroying the autonomy of private colleges and universities by making them "recipients" of federal assistance. The present bill unfortunately goes a long way toward subjecting every college or university to government domination. As the Washington Post has said, at a very minumum the bill requires close scrutiny and careful attention of the issues raised by Grove City and others testifying about this legislation.

Senator **Hatch**. We will turn to you, President Hafen, and take your testimony at this time.

STATEMENT OF BRUCE C. HAFEN

Mr. **Hafen**. Thank you, Senator Hatch.

I am here in two capacities, as president of Ricks College in Idaho, and as president of the American Association of Presidents of Independent Colleges and Universities. We call it AAPICU.

I appreciate the opportunity to be here. The attitude my testimony takes on the general issues involved in S. 2568——

Senator HATCH. Doctor Hafen, would you mind pulling that microphone just a little closer to you, and we can all hear a little better?

Thank you.

Mr. HAFEN. The attitude that my testimony takes on the general issues involved in S. 2568 is reflected in numerous official AAPICU resolutions adopted over several years. Time has not allowed a general membership meeting since the introduction of this bill, although I have shared the general approach of my testimony by mail with the AAPICU board and with the general membership. Of course, the views I express do not necessarily reflect the views of each of our 165 individual members.

I might mention also, Senator, I have submitted a rather detailed written statement for the record, from which I will share only a few excerpts in this verbal statement.

Senator HATCH. Without objection, we will put the complete statement in the record. It is an excellent statement, and we appreciate the effort you have put forth to be as detailed as you have been.

Please proceed.

Mr. HAFEN. Thank you. I apologize for the length and comprehensiveness of my written statement.

Senator HATCH. We are happy to have it.

Mr. HAFEN. But the more I looked at this bill, it seemed to me it is a very complex proposal, which I believe requires more than a cursory response.

Ricks College is a private, 2 year, coeducational institution enrolling about 6,500 students. AAPICU includes the presidents of some 165 private colleges and universities, from all across the country, representing a total enrollment of about 330,000 students. Some of these are large universities, such as Baylor, Villanova, and Brigham Young; however, most are small colleges, with enrollments under 2,500.

Many of our schools are church-related. All are deeply committed, as a matter of conscience, to the goals of nondiscrimination and equal opportunity in higher education. AAPICU is also committed to high standards of academic excellence. Several of our schools were given high marks in the recently reported poll from U.S. college presidents surveyed in U.S. News & World Report.

Many AAPICU colleges receive no direct Federal aid, although nearly all have, until now, admitted students who were receiving educational assistance. In general, the member institutions of AAPICU are distinguished from other private colleges and universities by their determined efforts, over many years, to finance their own operations from the private sector.

A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that if S. 2568 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied for the maximum possible Federal assistance over all these years.

Before the introduction of S. 2568, and before the Supreme Court handed down its decision in *Grove City,* I believed my own college was not subject to campus-wide title IX coverage. I had two bases for this view, the "recipient" and the "program-specific" requirements of the title IX statute.

The college had always refused every form of Federal aid, and my own legal training convinced me that indirect student aid alone should not make the college a recipient of Federal funds. The benefit an institution receives through its students is much more like such indirect benefits as tax benefits, than it is like direct Federal grants.

In *Grove City,* the Supreme Court held that enrollment of students receiving Federal aid made the college a recipient of assistance. Although it did also uphold the statute's program-specific concept.

Now, S. 2568 would eliminate that concept, as well. The Court's decision and this bill thus combine to force an impossible choice on schools such as mine. We have only two options, neither of which is desirable.

Option A is to refuse admission to students receiving any form of Federal aid. One result of this option is that students from disadvantaged backgrounds could not afford to attend since they may require substantial aid. We could try to raise our own student funds, but our costs, since we bear them ourselves, have already priced many of us out of the market.

Competing with increased governmental aid to students is simply impossible. Families interested in private higher education will wonder why they must pay four times for the education of their children: Once through State taxes to finance State universities and colleges, second, Federal taxes to finance Federal grants to other institutions.

Third, tuition at private colleges, and fourth, now a new special grant fund, to compete with Federal funds, to provide grants for students at private colleges.

Surely, the members of your committee are aware that private higher education is largely for financial reasons among the most endangered of species. The most serious potential result of Option A is that the ineligibility of all students receiving Government aid would sharply reduce enrollments in an already declining market, thus forcing through lost tuition, the closure of some private colleges.

It is not at all unrealistic, therefore, to suggest as a possible subtitle for S. 2568, "the bill to terminate private higher education."

Option B, on the other hand, is to accept the full-blown umbrella of Federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their reasons for existing. But, some will say, "better fed than dead."

Option B also portends serious national economic consequences, because major contributors from the private sector will regret the loss of private education's distinctive educational character, and hence lose interest in supporting it.

Moreover, private colleges will themselves have far less incentive to seek help from private sources, and it will be all too easy to line up at the Federal pay window, since nothing is gained by staying away.

The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

An additional concern under this option for the predominantly small and financially self-reliant schools of AAPICU is that their limited resources make it virtually impossible to add a new campuswide layer of personnel and procedures to satisfy the extensive compliance burden thus place on them. Their only answer may be to ask for more Federal funding to cover compliance costs, and for some it would be the first time they had ever asked for Federal funding.

Then not only do national education costs increase, but the claim that these schools are truly independent of the Federal Government really is destroyed, not because the schools are dependent on the Government for educational purposes, but because they are dependent on the Government to satisy the Government's purposes.

Consider now a few of the major specific problems with the assumptions and the broad language of S. 2568. First, the bill almost seems to assume there are no other civil rights laws in place to protect our national interest in nondiscrimination in the field of education.

However, all private institutions are subject to title VII of the Civil Rights Act, prohibiting discrimination in employment, and to the Retirement and Age Discrimination Act of 1978, prohibiting age discrimination. These institutions are also subject to numerous other Federal statutes affecting all employers, in addition to a variety of State laws. Private legal remedies are also arising to enforce nondiscrimination rights.

Second, I stress that the occasion for your committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses. There was no allegation or charge of discrimination in *Grove City.* The case dealt only with matters of statutory definition and congressional intent.

Third, as other witnesses have suggested today, this bill is shot through with major and serious ambiguities. I will not take the time even to discuss these. They are discussed at length in my written statement. I will just read the headings that are mentioned in the table of contents for my written testimony.

Does the bill expansively broaden Federal control over State governments, municipalities, and private activity?

Does the bill expansively broaden the term "recipient" to include schools which enroll students receiving general welfare assistance?

In other words, do students receiving Social Security benefits now, by enrolling, subject the institutions in which they enroll to the statutes we are talking about? That has not been the case in the past.

Does the bill broadly expand agency termination power?

Are parochial schools or other religious organizations subject to Federal jurisdiction under the bill?

Another item with which I am seriously concerned—and I raise this not as a make weigh argument at all, but as a constitutional point after considerable analysis of the Supreme Court cases on parochial aid—it seems to me there is a genuine risk that the construing of aid to students as aid to institutions, when the aid comes in the general form it does, violates the Supreme Court test for establishment of religion. When this aid goes through students, as the interpretation goes, to the institution, with no restrictions on how the money is thereafter used—for secular or nonsecular purposes—that needs a very close look.

If there were some amendment in the language so that for such insitutions the aid were regarded as aid to students, rather than to the institutions, those Supreme Court tests well established in the parochial aid area would probably be satisfied, and this problem could be avoided.

One final concern under the heading of major ambiguities: the possibility seems real to me that we put at risk with this legislation the concepts of tax exemptions and tax credits because of the underlying assumption of this bill that indirect Federal assistance should trigger Federal jurisdiction.

Turning to a fourth area, I would like to respond to the question I have heard some people ask. Why do private institutions worry so much about remaining independent?

There may be some people today who assume that the only reason a private school would pursue an independently defined mission is to cover some kind of invidious discrimination. That idea would not seriously be entertained by those who know even superficially the history of education in this country, or the theory of democratic pluralism on which our entire political system rests.

Our educational system, especially at the level of higher education, has long reflected, and cherished the diversity that is so natural and so healthy in a democratic system.

For centuries, the landscape of U.S. higher education offered a rich variety of colleges and universities, each a one-of-a-kind reflection of the unique vision of its founders. Many were founded by churches, seeking to provide a well-rounded education within a context of religious principles. Different schools had different characters. This diversity manifested a deeply held ideal that individuals and institutions should be permitted to pursue the goals of education in their own way.

Some colleges believed that the educational process can best take place where the student body is limited to one sex or the other. Others, where religious devotion is integrated with secular learning. Others, where learning is totally secularized, others where social interaction and recreation are restricted, others where social interaction and recreation are encouraged, others where technical and educational skills are emphasized, and still others where a devotion to classical liberal arts education is so complete that student preoccupation with careers is thought to be entirely inappropriate.

Which of these approaches to education is correct? The Government of the United States does not know, nor should it try to decide with finality.

Like the economic marketplace, the marketplace of ideas is well served by divergent approaches and brisk competition.

In addition to offering the consumer a wide array of choices, the competitors learn from one another, and the entire marketplace is improved. Perhaps more significantly, the variety and individual integrity of such diverse approaches comes close to the heart of this Nation's cherished belief that each man or woman should be free to define the meaning and purpose of his or her own life. That freedom includes a student's right to choose his or her own approach in a college education.

When the advocates of any single set of social issues or a single view about the best educational environment, or the best approach to education, for the members of either sex, would seize the power of law and government to impose their views above educational philosphy and methods to the exclusion of all other views, there is something wrong with our collective understanding about the place of education in promoting different individual paths and choices in pursuit of personal meaning.

Finally, let me make a comment on the special concerns under title IX, particularly as it would be expanded under this bill, for a college with a religious mission. Church-related institutions and colleges with an essentially religious orientation have been deeply concerned since its enactment, about the impact of title IX on their overall religious liberty.

There is a qualified exemption in the statute, providing that the law does not apply when its application "would not be consistent with the religious tenets of a religious organization which controls the educational institution."

However, many colleges and universities which have strong institutional commitments to religiously based moral values are not protected by this exemption, because they are not formally controlled by a religious organization.

Even for controlled institutions, the exemption leaves the burden of proof on the college to convince the Department of Education that there is in fact a specific tenet of a religious organization at stake in a particular situation, and that it conflicts with the application of some portion of the law or regulations.

Because this procedure leaves questions of interpretive religious doctrine in governmental hands, its constitutionality, as well as its wisdom, is questionable.

With S. 2568 expanding the coverage of title IX across an entire campus, even when there is no Federal assistance, other than aid to students, concerns about conflicts with religious liberty principles are correspondingly expanded. Not only the religion clauses, but the entire spirit of the first amendment protects a private institution of higher education from being forced to redirect its distinctive educational mission and environment to meet ends chosen by government. In this sense, educational institutions share the fundamental values of the first amendment with the press, with religious institutions and with our political institutions, all of which thrive, through the protections given, on free and robust discourse.

Church colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about family life and related value questions as central to the concerns of their students.

Thus, these schools have, as a matter of both educational and religious philosophy, played a vital role in augmenting their students' own family and religious life in the process of value formulation and value transmission regarding family oriented matters.

In this role, I stress that church schools act very differently from public schools, because State schools are extensions of the democratic state, which makes no claim to be a source of personal meaning and values, nor would we allow it to.

In general, title IX, as broadened by S. 2568, would tend to establish an official orthodoxy about value questions relating to the roles of the sexes in marriage and society, and touching on matters of sexual morality. There are many strongly held views on these issues in contemporary society. They are far from the category of settled questions.

Intrusive laws and regulations relating to family life and sex roles can be harmful to church-related colleges in two ways. One way is for the State to assume for itself the value transmission role by imposing one comprehensive order of meaning about such personal questions. The other way is for the State to imply by its regulatory authority that the Nation's official and legally enforced value position about the role of the sexes is one of unisex neutrality, which is itself only one value position, but government sponsorship is so potent that it seems to mark any contrary view as illegitimate. Either way, a chill comes over the campus environment, and the very soul of a church college is threatened. Church-related colleges and universities desire independence, not so that they can discriminate, but so that they can be discriminating about many of life's ultimate questions.

Let me offer a couple of specific items of illustration. These are elaborated on more fully in the written statement.

The current regulations appear to require schools to be blind to the occurrence of abortion or extramarital sexual activity in decisions relating to school policies or discipline. Yet many religiously oriented and other institutions believe that these are matters raising serious moral questions.

It is not at all clear, moreover, whether title IX permits college teachers and counselors to talk with their students about ways in which marriage may be compared to career choices, and yet those questions are central to what is on the minds of these students, especially at a church college.

Sex segregated housing for single students is allowed, up to the point of maintaining "separate living facilities," but the language is uncertain enough to make it difficult for institutions to know how to govern their affairs in a highly sensitive area.

My written statement also, Mr. Chairman, discusses, at some length, limitations on Federal regulatory power, both as a policy and constitutional matter.

I had thought, going into this research, that the day might be long past that there could be serious challenges under the spending power, or the commerce clause, to the reach of Federal authority.

On the contrary, I have found recent Supreme Court cases establishing some very important tests on limitations of the spending power and limiting congressional authority with respect to federalism.

You might recall the case just a few years back, when the 10th amendment was looked to as a source of authority, upholding the right of State sovereignty, so that Federal wage laws could not apply to State employees.

Senator HATCH. That is the *National League of Cities* v. *Usury* case.

Mr. HAFEN. Yes. There are other cases that have elaborated that test, but I think those bear close scrutiny, looking at the proposal.

Again, that is treated much more fully in the written statement.

Senator HATCH. I might add to that, though, Dr. Hafen, that has already been cut back somewhat.

Mr. HAFEN. That is correct. And we have tried to analyze the cases, that one, and those since that case, and I believe the tests can be applied here, in a way that might be helpful.

In conclusion, I have three recommendations, one a broad general one, and then recommendations for two possible areas for amendment.

It seems to me there are enough problems with this bill—ambiguities of major proportions—that the bill needs to be closely reexamined. Our experience with title IX over the last 10 years should be reviewed, and the whole approach and the factual environment in which the law is operated could help us make a better law, to further the objectives of the Federal Government in a way that will be workable and enforceable.

More specifically, I would recommend that consideration be given to broadening the religious exemption in title IX, to protect the interests of schools that are not controlled by a religious organization. Many religious schools would not meet that definition. Finally, I would recommend consideration be given to amending the definition of "recipient" to exclude colleges receiving no direct Federal assistance, and whose students receive no campus-based Federal aid programs.

There are more details that could be talked about on all of those items. I would be pleased to discuss them at the appropriate time.

Thank you very much.

Senator HATCH. Thank you so much.

If I can, I have to take a short break for a couple of minutes, and then we will continue with you, Mr. Roche, and finish up the rest of our witnesses, I hope, before the morning is out.

So let us recess for about 2 minutes, and then we will be right back.

[Short recess.]

[Mr. Hafen's prepared statement follows:]

Testimony of Bruce C. Hafen

President, Ricks College

and

President, American Association of Presidents

of Independent Colleges and Universities

Before the Senate Judiciary Subcommittee on the Constitution

Concerning S. 2568, "The Civil Rights Act of 1984."

May 30, 1984

Mr. Chairman and members of the Committee, I appreciate the opportunity of appearing before you. I am here primarily in my capacity as President of the American Association of Presidents of Independent Colleges and Universities (AAPICU). Additionally, I represent my own school, Ricks College, in Idaho, a private coeducational two-year college enrolling about 6,500 students. I am also interested in S. 2568 from my perspective as a Professor of Law at Brigham Young University. While I claim no special expertise in civil rights law, my publications in scholarly legal journals in the fields of family and constitutional law have been cited by the Supreme Court and by law school textbooks.

I. Background.

My perspective as a witness is centrally concerned with the effect of broadening the application of Title IX to private colleges receiving no direct federal financial grants. The main objective of S. 2568 is to create institution-wide coverage by several civil rights laws in situations where substantial federal aid is already flowing to some part of an institution or organization. I foresee some serious problems in the approach of the Bill to that general goal, and will mention some of those problems today. However, whatever else I may say, I hope my testimony helps you especially to see the severe problems the Bill would create for that tiny fraction of America's colleges and universities which have tried to remain financially independent of government.

A. Description of AAPICU.

AAPICU, organized in 1968, includes the presidents of some 165 private colleges and universities from 40 different states, with a total enrollment of about 330,000 students.[1] Some of these are large universities, such as Baylor, Villanova, and Brigham Young. However, most are small colleges with enrollments under 2,500. Many of our schools are church-related, representing numerous denominations. All are deeply committed as a matter of conscience to the goals of non-discrimination and equal opportunity in higher education. (Parenthetically, we at Ricks College are very proud of the success of our women's track team, which a few days ago won second place in the National Junior College Athletic Association's national finals.) AAPICU is also committed to high standards of academic excellence. Several of our member schools were ranked among the nation's finest colleges — public or private — in the recently reported poll from U.S. college presidents in U.S. News & World Report.[2]

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[1] A membership list is attached to my written statement.

[2] U.S. News & World Report, Nov. 28, 1983, p. 41. Berea College in Kentucky, Furman University in South Carolina, Pepperdine University in California, Whitworth College in Washington, William Jewell College in Missouri, Hillsdale College in Michigan, and Wheaton College in Illinois.

Virtually all of AAPICU's member schools have, until now, admitted students who receive federal financial assistance. However, about 60% of our schools receive no federal aid beyond what their students receive. Even among the other 40%, their direct federal aid represents but a slight fraction of their total operating revenues.[3] In general, the member institutions of AAPICU are distinguished from other private colleges and universities by their determined efforts over many years to finance their own operations totally from the private sector. A principal motivation for this self-reliance has been an intense desire to remain independent of governmental control, in order to pursue distinctive educational missions. How ironic it is for these college presidents to realize today that, if S. 2568 is passed, they will be as completely overwhelmed by the collective cloak of regulation as if they had applied for the maximum possible federal assistance over all these years.

B. AAPICU's Prior View of Title IX.

Before the introduction of S. 2568 and before the Supreme Court handed down its decision in the Grove City case, AAPICU took the position that schools receiving no direct federal aid were not subject to campus-wide Title IX coverage. There were two bases for this view: first, that student aid alone did not make a college a "recipient" of federal aid and, second, that the "program specific" concept limited statutory coverage to the program or activity receiving the aid.

1. Did student aid make a college a "recipient" of federal aid?

The Title IX regulations took the position that an institution is a recipient when a student accepts financial aid, evidently on the theory that when an institution indirectly benefits from aid to one of its patrons, the result is the same as with direct institutional aid. [4] That theory contradicts some very important legal principles well established in other contexts, including those that allow tax exemptions to all charities and those that have allowed aid to parochial schools without amounting to an establishment of religion. [5] It also contradicts the legislative history of Title VI, which the Supreme Court has said may be "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ." [6] Nevertheless, the Education Department's position on the definition of "recipient" in Title IX was ultimately upheld as a matter of statutory interpretation by the Supreme Court in the Grove City case earlier this year. For reasons to be explained later in my testimony, this portion of the Grove City ruling needs to be corrected by congressional action. [7]

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[3] Nearly half of the direct aid recipients in AAPICU report their non-student federal assistance is 1% or less of total revenues. About 90% of these recipients report that direct assistance is less than 8% of their revenues.

2. Program Specificity. The question of whether Title IX as originally enacted embodied coverage that was "program specific" or institution-wide has been the subject of much debate, including debate in these hearings. All but one of the court cases that considered the question upheld the program-specific interpretation after

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[4] Title IX itself forbids sex discrimination under any "program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (emphasis added). The statute does not define "recipient" but the term is defined in the Department of Education's regulations, 34 C.F.R. § 106.2(h) (1983), to include educational institutions that "benefit" from assistance to others. The definition for "Federal financial assistance" is also only found in the regulations. 34 C.F.R. § 106.2(g) (1983).

[5] See text accompanying nn. 35-42, infra.

[6] Grove City College v. Bell, 104 S. Ct. 1211, 1228 (Brennan, J., dissenting).

[7] See text accompanying nn. 62-71, infra.

reviewing the statute and its legislative history.[8] The most significant of these decisions is, of course, the Supreme Court's recent Grove City case.[9]

Yet the view has been vigorously expressed by some members of the current Congress that the House and Senate which enacted Title IX in 1972 obviously intended institution-wide rather than program-specific coverage. It is genuinely puzzling to an outsider that the intent of Congress and the meaning of a powerful new law on a matter of such fundamental importance could be so difficult to establish. The clearest lesson to be learned from this experience is that grave risks accompany the enactment of vague, symbolic laws passed without adequate deliberation on the assumption that somebody will attend later to the details. It is to be earnestly hoped that congressional action on S. 2568 will not be another illustration of that attitude. The current high interest in the subject presents a remarkable opportunity to review the nation's twelve-year experience with Title IX, so that our entire approach to the problem of sex discrimination in education can be updated, clarified, and focused in ways that accurately reflect the factual environment and the intent of Congress. The hasty generalizations reflected in the present approach to S. 2568 fall short of that goal.

8/ See, e.g., North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated, 52 U.S.L.W. 3700 (U.S. March 26, 1984) (in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984)); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) (interpreting program specific requirement under section 504 of the Rehabilitation Act); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) (interpreting program specific requirement under Title VI). For another view of the judicial precedent, see 104 S. Ct. at 1230-1231 (Brennan, J., dissenting). The only case rejecting program specificity was Grove City College v. Bell, 687 F.2d 684 (3rd Cir. 1982). See also, 117 Cong. Rec. 30155-30157, 30408 (1971) where Congress failed to adopt Senator Bayh's Title IX proposal which did not have a program specific limitation.

9/ 104 S. Ct. 1211 (1984).

C. The Impossible Dilemma of S. 2568 for Independent Colleges.

If S. 2568 should pass in its present form, eliminating the program-specific concept and leaving in place the Supreme Court's broad definition of "recipient," private colleges and universities receiving no direct federal assistance will be subject to campus-wide regulation if only one student on a federal grant should enroll. This situation presents these schools with an impossible choice. There are only two options, neither of which is desirable.

1. Option A — Refuse Admission to Students Receiving Federal Aid.

Option A is that schools desiring to remain free of federal regulation must deny admission to any student who would, by being a recipient of a federal grant, make the school a legal "recipient" of federal aid. Colleges that take this position would probably face sharply reduced enrollments, because their students would have such obvious financial incentives to attend elsewhere, where federal funds would be available to them.

It is a tribute to the quality of the educational product offered by independent colleges that they have maintained their enrollments at all during recent years of rising prices and falling enrollments throughout higher education. But it is asking too much, realistically, to expect them to compete not only with the lower tuitions of state supported schools, but also with the federally funded student aid programs not available to their students. The independent schools could try to raise their own student funds, but their costs — because they bear them from private sources only — have already priced many of them out of the market. Private college tuitions average four to five times the amount of average public school tuitions.[10/] The impact of this competitive disadvantage is reflected in the report that the number of private sector colleges declined by about 11% in the nine years from 1969 to 1978: 120 closed outright, 40 merged with

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[10/] Education Commission of the States, Task Force on State Policy and Independent Higher Education (1977), p. 3.

other independents, and 16 merged with public institutions, for a total decline of 176 colleges. [11]

The attitude of private school supporters toward the idea of creating private grant funds to compete with federal grant funds will also reflect the frustration of being forced to pay four times for the college education of their children: once by supporting public colleges through paying state taxes, once by supporting federal student aid through paying federal taxes, again by paying expensive private college tuition, and still again by paying for private school student aid funds. At some point the camel's back will simply break. Some Option A schools will be brought to that point by lost tuition income, and will simply close their doors. It is not at all unrealistic, therefore, to suggest as a possible subtitle for S. 2568, "the Bill to terminate independent higher education."

Some may question whether any college or university would actually be so concerned about maintaining its independence from federal regulation that it would exercise Option A. Grove City College and Hillsdale College have already made public announcements that they will adopt this position. A recent telephone survey of a sample of AAPICU members asked the presidents of the schools that receive no direct federal aid what they intend to do if S. 2568 passes, making their entire campuses subject to complete regulation on the basis of student aid alone. Of the 58 colleges responding, while 28 indicated they would probably continue to accept students on federal assistance, 29 said they had not yet made a decision, and 1 indicated a definite decision not to accept such students.

One additional consequence of Option A is that it will force independent colleges to exclude, and thus discriminate against, students who need federal aid to obtain higher education. There is a particular irony here, since the students who are most in need of financial assistance due to their disadvantaged backgrounds tend to be

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11/ The Chronicle of Higher Education, Dec. 18, 1978, pp. 7-8.

the same students Congress seeks to help by expanding the coverage of the civil rights laws. It can be reasonably argued that the student being thus helped should be free to take the conscious "risk" of attending an unregulated college, if that is the student's preference.

2. Option B — Better Fed Than Dead. Option B is to accept the full blown umbrella of federal regulations across the entire campus. This prospect would force some schools into an intolerable compromise with their very reasons for existing. [12] But, some will say, "Better fed than dead."

Further reflection will suggest the foolishness of forcing the nation's last remaining vestige of truly independent higher education into the homogenizing mold of quasi-public schools. The chief educational contributions, as well as the continued survival, of independent colleges and universities are found primarily in their ability to offer unique educational alternatives to those seeking higher education. It is only by defining their educational missions on their own terms that these institutions have attracted both students and private sources of funding. Because Option B forces the loss of such distinctive contributions, American higher education will lose a major source of the initiative and innovation necessary to maintain true pluralism and diversity. Further, the independent schools will themselves thereby lose their primary competitive advantage.

Option B also portends serious economic consequences. For instance, the financial self-reliance of independent colleges has clearly made more public funding available to public sector schools, because the public schools have had less competition from private schools for government funding. That will no longer be true. Moreover, major contributors from the private sector will regret the loss of private education's distinctive character and hence lose interest in supporting it. And, of course, private colleges will themselves have far less incentive to seek help from private sources. It will

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12/ The reasons why campus-wide coverage under Title IX has this effect are discussed in the text accompanying nn. 44-61, infra.

be all too easy to line up at the federal pay windows, since nothing will be gained by staying away. The aggregate reduction of private sector support for the staggering costs of national higher education under these circumstances should not be taken lightly.

D. Mistaken Assumptions About Discrimination on Private College Campuses.

It should be stressed that the occasion for your Committee's current deliberations is not that new evidence of discrimination or lack of actual commitment to civil rights has been found on American campuses, public or private. There was no allegation or charge of discrimination in Grove City. The HEW administrative law judge in the Grove City case stated that "there is not the slightest hint of any failure to comply with Title IX, save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief." [13] Grove City College was guilty, not of discrimination, but of independence.

However, the public perception seems to be otherwise. In its story on the subject legislation on May 8, 1984, the Washington Post erroneously stated regarding the Grove City case, "The administration applauded the court decision, which barred a total aid cutoff to Grove City College in Pennsylvania under Title IX of the Education Act of 1972 after it was found that one of its programs discriminated against women." [14] It should not be so difficult to believe that independent colleges really could oppose allowing the federal government to define the terms of their educational missions, yet at the same time take very seriously their privately held commitments to the goals of equal opportunity in education. [15]

In addition, S. 2568 almost seems to assume there are no other civil rights laws in place to protect the interests of non-discrimination in private colleges and universities. However, all private institutions are subject to Title VII of the Civil Rights Act prohibiting discrimination in employment, and the Retirement and Age Discrimination Act of 1978, prohibiting age discrimination. Private colleges and universities are also subject to numerous other statutes affecting all employers. In addition, these institutions are subject to state civil rights laws and a variety of private legal remedies now arising to enforce nondiscrimination rights.

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[13] Grove City College v. Bell, 104 S. Ct. at 1224 (1984).

[14] "Split Continues Over Rights Bill," Washington Post, May 8, 1984 (emphasis added).

[15] See text accompanying nn. 44-61, infra.

II. Major Ambiguities in S. 2568.

S. 2568 contains some surprisingly serious ambiguities which have two major effects. For one thing, a witness cannot be sure of either the actual or the intended impact of the legislation, making it very difficult to testify in a realistic way about its implications for independent higher education. The entire Bill is shot through with major uncertainties about its meaning, showing also a compelling need for a more deliberative approach to the legislative process than has been taken to date.

To its most ardent supporters, S. 2568 may look like a 90-yard touchdown pass. Closer inspection will reveal yellow flags all over the field.

This bill has been widely described as a minor amendment intended only to overturn the "program-specific" portion of the Supreme Court's ruling in the Grove City case.[16/] That is simply not true, as persuasively documented in the testimony of Assistant Attorney General Reynolds, who identified such sweeping problems as the Bill's limitless definition of "recipient," its substantial alteration of the entire approach to enforcement of most major civil rights laws, and the perplexing administrative problems it would create.[16a/]

16/ Proponents of S. 2568 have given assurances that its "narrow purpose . . . is to eliminate the inappropriately restrictive interpretation imposed by the Grove City decision and reaffirm the legal safeguards available under these civil rights statutes." (130 Cong. Rec. S4585 (daily ed. April 12, 1984) (joint explanation by Senator Kennedy and Senator Packwood).) Senator Dole has stated that "[i]t is not the intent of the sponsors to break new ground." 130 Cong. Rec. S4590 (daily ed. April 12, 1984).

16a/ See n.18, infra.

There are additional substantive ambiguities affecting private education that cry out for clarification. Consider some examples.

A. Does S. 2568 Expansively Broaden Federal Control Over State Governments, Municipalities, and Private Activity?

AAPICU's interest is primarily in the application of S. 2568 to private education. For that reason, it is beyond the scope of this statement of testimony fully to explore the possible ramifications of the Bill for other portions of the private sector and for the complex system of federalism. However, since it has been recently observed that, "this legislation is barreling through Congress with essentially no opposition,"[17] I desire to register the strongest possible concern about the Bill's potential effects far beyond the realm of education. It is quite possible that issues relating to the appropriate extent of federal authority are more seriously raised by S. 2568 than are issues pertaining only to civil rights.[18]

B. Does S. 2568 Expansively Broaden the Term "Recipient" to Include Schools Which Enroll Students Receiving General Welfare Assistance?

While the expansive definition of "recipient" in S. 2568 reflects an understandable desire to eliminate all potential discrimination, the trouble with such limitless terms is that they become meaningless, as well as impossible to enforce realistically. Under this definition, would a social security beneficiary attending a private college cause the college to be a recipient of federal aid? What about a student who pays his tuition with earnings from a summer job on a federally funded highway construction project? These are not far-fetched questions, since in both cases the school is as much a

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17/ Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984. Professor Finn teaches at Vanderbilt University.

18/ For more detailed expressions of this concern, *see id.* *See also* the testimony of Assistant Attorney General, Wm. Bradford Reynolds on the subject legislation before the House of Representatives, May 22, 1984.

"transferee" of federal funds through an "entity or person" as is the case in explicit student aid programs.

Under present law (assuming S. 2568 is not enacted), "federal financial assistance" for purposes of Title IX is confined to assistance "extended under a law administered by the (Education) Department." 19/ Since welfare benefits are not administered by the Department of Education, the hypothetical cases mentioned would not trigger coverage by Title IX. In addition, the majority's analysis of the recipient question in Grove City clearly distinguished general-purpose welfare assistance from student aid by noting that "there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX" because "these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities." 20/

There is actually little practical difference in the "benefit" provided to a school between general assistance programs received by students (and spent to defray the cost of attending college) and student aid. However, the legislative background for Title IX also indicates that general welfare assistance would not trigger coverage of private institutions. "Title IX was patterned after Title VI of the Civil Rights Act of 1964," 21/ making the legislative history of Title VI "crucial to an understanding of congressional intent in 1972 when Title IX was enacted . . . ." 22/ Senator Humphrey, a chief sponsor of Title VI, stated:

> Perhaps the greatest amount of Federal assistance funds goes for direct programs, in which Federal funds are paid directly by the United States to the ultimate recipient, such as social security payments, veterans' compensation and pensions,

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19/ 34 C.F.R. § 106.2(g) (1983).

20/ 104 S. Ct. at 1218 n.13.

21/ Cannon v. University of Chicago, 441 U.S. 677, 694 (1979).

22/ 104 S. Ct. at 1228 (Brennan, J., dissenting).

> civil service and railroad retirement benefits. Contrary to assertions that have been made, title VI will have no practical effect on such programs. . . . It is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs. [23]

However, S. 2568 makes several changes which cast doubt on the continued validity of the proposition that civil rights laws relating to federal funding do not create coverage through general welfare assistance. The much-debated "program or activity" phrase in Title VI (and the other statutes involved in S. 2568, which all use these terms) has been held to be the key language showing Congress' intent that general assistance payments not trigger coverage. [24] S. 2568 would remove this language from the statutes, which may suggest an intent to change the former approach to general assistance payments to individuals.

In addition, in place of the "program or activity" language, S. 2568 substitutes "recipient of Federal financial assistance." An extremely broad new definition of "recipient" would also be placed in the statutes, including "any . . . private . . . institution . . . to which Federal financial assistance is extended . . . directly or through . . . a person." The enactment of this language could also be viewed as evidence of intent to extend the application of these statutes to general assistance payments.

Furthermore, while the definition in S. 2568 of "recipient" is taken from language in existing regulations, [25] the new statutory definition omits an important exception for general assistance payments found in the definition of "recipient" in the regulations. In implementing congressional intention that general assistance to "ultimate recipient[s]" will not make "other persons with whom he [or she] deals . . . participants in or beneficiaries of these Federal programs," [26/] regulations under Title VI and section 504 of the Rehabilitation Act contain the following limitation on the definition of "recipient": "but excluding the ultimate beneficiary of the assistance." [27/]

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[23] 110 Cong. Rec. 6544-45 (1964). See also id. at 6562 (statement of Senator Kuchel); Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

[24] Bob Jones University v. Johnson, 396 F. Supp. 597, 602 n.16 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

[25] See, e.g., 34 C.F.R. § 106.2(h) (1983) (Title IX regulations).

The deletion of the "program or activity" language, the broad definition of "recipient," and the omission of the limiting language contained in the regulations from which the definition was taken may well convince a court that Congress was aware of what it was doing and intended the new language to have a broader application than the former understanding and construction of these statutes would permit.

C. Does S. 2568 Broadly Expand Agency Termination Power?

A critical feature of the remedial schemes under Title VI and Title IX is the so-called "pinpoint" termination power of the regulating agency. [28/] The power of agencies to terminate funds is thus limited to the "particular program, or part" of an institution which is not in compliance with the statute or regulations. Senator Humphrey stated in 1964 that this statutory limitation was "designed to limit any termination of Federal assistance to the particular offenders in the particular area where unlawful discrimination occurs. . . . [T]he termination shall affect only the particular program, or part thereof, in which such a violation is taking place." [29/] The rationale behind the

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[26/] 110 Cong. Rec. 6544-45 (1964) (statement of Senator Humphrey).

[27/] 34 C.F.R. § 104.3(f) (1983) (Department of Education regulations implementing section 504). See, e.g., 7 C.F.R. § 15.2(e), 15b.3(f) (1984) (Department of Agriculture regulations implementing Title VI and section 504); 32 C.F.R. § 300.2(g) (1983) (Defense Department regulations implementing Title VI). The Department of Education's Title IX regulations omit this limitation on the definition of a "recipient," 34 C.F.R. § 106.2(h) (1983), presumably because the Department does not extend general assistance welfare-type benefits to individuals.

[28/] 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682.

[29/] 110 Cong. Rec. 12689 (1964). For a summary of the pinpoint provisions of Title VI and Title IX, see Kuhn, Title IX: Employment and Athletics Are Outside HEW's Jurisdiction, 65 Geo. L.J. 49, 64-67 (1976).

"pinpoint" termination power was that "Title VI is not punitive." 30/ In addition, the intent of the program-specific limitation in Title VI "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." 31/

The sponsors of S. 2568 state that the "bill also retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law." 32/ S. 2568 would provide that termination of funds is "limited in its effect to the particular assistance which supports . . ." the noncompliance, 33/ rather than to the "particular program, or part" where noncompliance is found. The term "supports" in S. 2568 is ambiguous and is capable of gutting the pinpoint termination provision currently in the statutes and regarded by original congressional sponsors to be an essential component of the remedial scheme. For example, any time federal funds to one department in a university (or another large organization, such as a state) could be said to effectively increase the funds available to some other department by some amount, it could be said that the federal assistance to a complying department "supports" the noncomplying department and thus funds could be terminated for a department which was in compliance with the statutory requirements. Such an interpretation finds some support in Senators Kennedy and Packwood's statement regarding S. 2568 that the "requirement of a nexus . . . could be direct or indirect." 34/ In addition, since the "program . . . or part"

30/ 110 Cong. Rec. 6544 (1964) (statement of Senator Humphrey).

31/ Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis in original).

32/ 130 Cong. Rec. 54587 (daily ed. April 12, 1984) (joint explanation of Senators Kennedy and Packwood).

33/ 20 U.S.C. § 1682 (italicized words are added by S. 2568).

34/ 130 Cong. Rec. S4587 (daily ed. April 12, 1984).

language limiting the termination power has nothing to do with reversing the Supreme Court's program specificity holding in Grove City, a future court interpreting the change may well conclude that Congress considered and intended to significantly broaden the termination power. Such a significant expansion of the total remedial scheme has ramifications so extensive that clarification of this issue is imperative before action on S. 2568 is taken.

D. Are Parochial Schools or Other Religious Organizations Subject to Federal Jurisdiction Under S. 2568?

Church-related elementary and secondary schools receiving no direct federal financial assistance have tended to be exempt from the coverage of Title IX, even though the schools or their students may receive certain forms of aid from state governments. However, under S. 2568 they could possibly be covered under either of two theories. Under one theory, parochial schools that are organizationally related to a collection of church-owned entities could now be subject to regulation under S. 2568's "trickle down" or "trickle up" [35] extensions of jurisdiction from one entity to another. For instance, if a Church owns hospitals as well as schools, its schools might be covered when its hospitals receive a federal research grant or perhaps provide services to medicare patients.

Under the "trickle up" aspect of the "recipient" definition, it seems fair to ask also whether the Church itself in this example is subject to regulatory jurisdiction. It would be a "private institution", a "subunit" of which is receiving federal financial assistance "through another person," just as a school is a "recipient" when its students receive aid. This circumstance would also raise the questions discussed below about violations of the Establishment Clause.

Under the other theory, a parochial school receiving any assistance from a state government might arguably be included as an "assignee" of a State receiving federal aid. This would appear to be the case whether or not the funds sent by the State to the private school are themselves federal funds, since the State's ability to provide financial assistance to the private school is clearly "supported" by any federal assistance given the State to offset its other educational obligations. In this sense, a State that is assisted in meeting its obligations by a federal grant is much like a student whose federal grant enables the student to pay tuition costs, even if the student uses his or her own funds for tuition and the grant for other expenses.

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[35] See testimony cited at n.18, supra.

E. An Unconstitutional Establishment of Religion?

S. 2568 expands on the basic theory of the Grove City case by making all "transferees" of assistance into "recipients" for purposes of statutory coverage. The federal assistance programs involved are, of course, already made widely available to church-related institutions. When these circumstances are examined in light of Supreme Court case law, S. 2568's total blurring of direct and indirect forms of governmental aid that may benefit religious entities probably creates an unconstitutional establishment of religion.

Ever since the first parochial school aid case, Everson v. Board of Education,[36/] the question whether governmental aid was extended to the families of school pupils or to the schools themselves has been a critical issue in Establishment Clause analysis. As the Court stated in Everson, "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents. . . ."[37/] And in its most recent case on the same subject, Mueller v. Allen,[38/] the Court said, in upholding the constitutionality of parents' state tax deductions for school expenses, "It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct

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[36/] 330 U.S. 1 (1947).

[37/] Id. at 18.

[38/] 51 U.S.L.W. 5050 (1983).

transmission of assistance from the state to the schools themselves." [39] Whether aid to parochial schools was "direct" or "indirect" was, then, a crucial distinction in these cases. Aid to students and/or their families has been treated as "indirect", thus making certain forms of such aid constitutional, even though the Court also recognized in Mueller "that financial assistance to parents ultimately has economic effects comparable to that of aid given directly to the schools attended by their children." [40] However, under the Court's ruling in Grove City, the concept of which is greatly expanded in S. 2568, aid to students is regarded as aid to the colleges they attend on an indirect benefit theory. Establishment Clause issues were not raised by the parties to Grove City, but an application of its facts to more formally church-related colleges would clearly raise the issue.

The test for Establishment Clause violations is much more flexible in the context of colleges and universities than it is in parochial schools. However, the Supreme Court cases upholding governmental aid to church-related colleges have established some fundamental criteria that are probably violated by S. 2568's blurring of direct and indirect aid. The Court has allowed state aid to church-related colleges when the funds were used to construct buildings intended to be used exclusively for non-sectarian purposes on campuses that were not "pervasively sectarian." [41] And in the more recent case of Roemer v. Board of Public Works of Maryland, [42] the Court upheld the constitutionality of direct financial aid by a state to a church-related college because it found that the college was not pervasively sectarian and that secular activities alone were funded by the state aid. In Roemer, the college made an annual accounting of funds received from the state in order to show that these funds had been used only for "secular" activities on the campus.

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[39] Id. at 5053.

[40] Id. (emphasis added).

[41] Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

[42] 426 U.S. 736 (1976).

If aid to students at church-related colleges and universities is legally regarded as aid to the institutions, the Roemer test cannot be satisfied unless the colleges both keep track of fund uses and can show exclusive secular use. But when a student on a federal grant pays his tuition, who knows whether the tuition is being paid from grant sources or private sources? Students obviously co-mingle their personal funds with grant funds. Through how many transactions and "transferees" must a careful accounting follow to determine secular use? The reality is, of course, that student aid is to students, and student aid alone should not violate the Establishment Clause under the prior cases. The Establishment Clause ramifications of regarding student aid as institutional aid make clear that S. 2568's excessive stretches of logic designed primarily to find more "recipients" for regulatory purposes will cast serious doubt on the constitutionality of all student aid programs that affect church schools.

It could be argued that the religion exemption contained in Title IX might, at least as to that statute, satisfy any Establishment Clause concerns. Such is not the case, however, because Title IX's religion exemption is not a complete exemption from statutory coverage. The exemption is limited to circumstances where application of Title IX "would not be consistent with the religious tenets" of a sponsoring church. More importantly, this exemption intends to avoid undue interference with religious liberty; it is not designed to avoid an unconstitutional establishment of religion.

This potentially significant ambiguity could be resolved by amending the definition of "recipient" in such a way that aid to students is not regarded as aid to institutions. Such an amendment would also be more consistent with the indirect/direct distinction recognized by the Supreme Court in the parochial school aid cases.

F. Putting at Risk the Concepts of Tax Exemptions and Tax Credits?

One of the most far-reaching potential consequences of S. 2568 is that it proceeds from the basic theory that any entity, public or private, state or federal, which receives indirect support from federal financial assistance should be subject to compliance with a broad and stringent range of federal laws as a condition of receiving the indirect benefit. The indirect benefit idea clearly underlies the assumption that aid to students constitutes aid to the institutions they attend. The same idea pervades the Bill's elaborate definition of "recipient," which includes "any public or private agency, institution . . . or other entity (including any subunity of any such . . . entity) . . . to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

As unlimited as this language is, it is still unrealistic to imagine that it would by itself seriously raise the question whether tax-exempt religious and other organizations are, by virtue of the "support" or indirect benefit they receive from their tax exempt status, subject to the civil rights laws. However, the utter disregard in the language of S. 2568 for the lines that have traditionally marked the boundaries between the public and private sectors or the boundaries between federal and state sectors [43/] makes it irresistible to conclude that this law, if enacted, surely brings the nation a major step closer to the day when tax-exempt status may be conditioned on compliance with the federal public policies reflected in not only the civil rights laws, but other major federal legislation. To lump all the categories of the non-discrimination laws together in one breathtaking extension of federal jurisdiction, as S. 2568 does, at least suggests that Congress would one day be willing to condition all tax exemptions on compliance with the terms of "public policy" outlined in this very Bill. That possibility should be cause for

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43/ *See* the testimony of Wm. Bradford Reynolds, n.18, *supra*.

sober reflection by all who are interested in the activities of charitable institutions in the United States.

These are only some of the major ambiguities which would result from the passage of S. 2568 after little more than superficial consideration by Congress. Congress could obviously clarify these and other ambiguities in the Bill, but only if it is willing to take adequate time for detailed consideration of a complex statutory scheme that is as intricate as it is significant. S. 2568 is not a proposal that appropriately lends itself to a congressional procedure designed to avoid, rather than encourage, careful scrutiny.

III. Particular Areas of Harm to Independent Colleges from Campus-Wide Coverage of Title IX.

Even if one reads the areas of ambiguity narrowly, substantial harm is still done by S. 2568 to independent institutions receiving no federal aid beyond what their students receive. This harm arises primarily from the extension of campus-wide coverage under Title IX. Without S. 2568, of course, coverage would be limited to the financial aids office.

A. The Costs of Compliance.

Even under prior anti-discrimination laws (which have carried a smaller compliance burden than is contemplated by S. 2568), and even at large public universities (which have received federal funding to help pay the administrative costs of compliance), "[t]he cost of implementing federally mandated social programs at the university level has been estimated at five to eighteen percent (5-18%) of tuition revenues, which exceeds the total amount of all voluntary giving to institutions of higher education in the United States." 44/

44/ D. Oaks and C. Durham, "Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights," in Accountability — Keeping Faith With One Another, p. 69 (National Congress on Church-Related Colleges and Universities, 1980).

The proposed Bill would increase this already crushing task by expanding the compliance obligation across an entire campus, regardless of the kind or extent of any federal funding. This means a college receiving no federal assistance other than student aid would receive no additional help from government or other outside sources to pay for the new campus-wide layer of trained personnel and intricate procedures necessary to satisfy its compliance duties. Not only would this unfunded new duty cover all educational activities, it would evidently cover all non-educational functions of a college as well. Even beyond this, S. 2568 gives all federal funding agencies authority to regulate all of a college's programs, so that the compliance burden is conceivably multiplied in geometric proportions. [45]

The prior philosophy in all four of the statutes affected by S. 2568 was that there should be some kind of rational relationship between (1) the amount and extent of federal aid received by an institution and (2) the amount and extent of the regulatory and compliance burden. That was one of the reasons why supervisory and enforcement authority was limited by the statutes to the program or activity that actually received the federal assistance.

One wonders not only about the source for the personnel and the budget needed to sustain these vast new costs at colleges and universities, but also where the personnel and budget will come from to sustain the concomitant supervisory and enforcement burden inevitably to be felt by federal agencies. In a day when both higher education and government have been nearly panic stricken over their own financial deficits, it is not hard to wonder whether the Congress is acting with a full consciousness of its actions.

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[45] This fact and some of its implications are addressed in the House testimony of Assistant Attorney General Reynolds, supra n.18, and in the text accompanying nn. 16-34, supra.

The limited resources of the small, independent colleges of AAPICU may make it virtually impossible for them to fully shoulder their compliance duties. Their only answer may be to ask for additional federal funds to cover compliance costs. Then not only do national educational costs increase, but the claim that these schools are truly independent of the federal government really is destroyed — not because the schools are dependent on government for educational purposes, but because they are dependent on government to satisfy the government's purposes.

B. The Costs of Yielding Educational Independence.

There may be some people today who assume the only reason a private school would pursue an independently defined mission is to cover up some kind of invidious discrimination. That idea would not be seriously entertained by those who know, even superficially, the history of education in this country or the theory of democratic pluralism on which our entire political system rests. Our educational system — especially at the level of higher education — has long reflected and cherished the diversity that is so natural and so healthy in a democratic system. For centuries, the landscape of U.S. higher education offered a rich variety of colleges and universities, each a one-of-a-kind reflection of the unique vision of its founders. Many were funded by churches seeking to provide a well-grounded education within the context of their religious principles. Different schools had different characters.

This diversity manifested a deeply-held ideal that individuals and institutions should be permitted to pursue the goals of education in their own ways. Some colleges believed that the educational process can best take place where the student body is limited to one sex or the other; others, where religious devotion is integrated with secular learning; others, where learning is totally secularized; others, where social interaction and recreation are restricted; others, where social interaction and recreation are encouraged; others, where technical and vocational skills are emphasized; and still others, where a devotion to classical liberal arts education is so complete that student preoccupation with careers is thought to be inappropriate.

Which of these approaches is correct? The government of the United States does not know, nor should it try to decide with finality. Like the economic marketplace, the marketplace of ideas is well-served by divergent approaches and brisk competition. In addition to offering the consumer a wide array of choices, the competitors learn from one another and the entire marketplace is improved. Perhaps more significantly, the variety and individual integrity of such diverse approaches comes close to the heart of the nation's cherished belief that each man or woman should be free to define the meaning and purpose of his or her own life. That freedom includes a student's right to choose his or her own approach in a college education.

When the advocates of any single set of social issues or any single view about the "best" educational environment, or the "best" approach to education for the members of either sex, would seize the power of law and government to impose their views about educational philosophy and methods to the exclusion of all others, there is something wrong with our collective understanding about the place of education in promoting different individual paths and choices in the pursuit of personal meaning.

Being more specific about the reasons why private (especially religious) colleges have cherished privacy, consider the thoughts of Mr. Justice Jackson in a 1947 Supreme Court opinion: "I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic Church . . . . Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests." 46/ Yet it was precisely because he so well understood the nature and purpose of parochial schools that Justice Jackson in that

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46/ Everson v. Board of Education, 330 U.S. 1 (1947) (dissenting opinion).

same case gave this warning, which in today's context seems so relevant: "If the state may aid these religious schools, it may therefore regulate them." 47/

But the Supreme Court has consistently believed the state should not regulate religious schools. The case from which these lines are taken marked the beginning of a long and frustrating struggle in the Supreme Court and elsewhere about the best way to encourage private, church-related education without undermining the independence which is its lifeblood, yet also without undermining our constitutional commitment to the idea that government should not establish religion. Now, many years, many state legislative enactments, and many Supreme Court cases later, a few principles have been developed by which the Court has struck a workable balance between the competing concerns. Regulation by the states of a kind that would irreparably damage the religious character of the parochial schools has been avoided. Inappropriate levels of financial aid to church-related schools have been avoided. Many problems, including large financial ones, remain. But the cause of the parochial schools has been accommodated within our constitutional framework. The distinction between direct and indirect aid has been vital. 48/ Through it all, we seem to have believed what the Supreme Court said in 1925 about the right of private schools to exist with a restrained sense of state accommodation alongside the public schools: "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 49/

47/ Id.

48/ See text accompanying nn. 36-42, supra.

49/ Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

At the level of higher education, there are many reasons why independent and church-related colleges and universities have struggled and floundered in an increasingly secularized society. But one of the primary causes of their decline as a serious educational force in recent years has been their inability to obtain necessary financial sustenance. Tuitions can only rise so high, and then they are out of reach for most of those who desire a private education. The federal government has recognized the growing financial plight of all of America's colleges and universities, and remarkable increases in federal student and other financial aid have blessed the entire nation in the last several years. But we have taken an approach to student financial help for students desiring to attend private religious colleges that has somehow misunderstood the need to provide necessary resources without at the same time forcing the independent schools into some monolithic, quasi-public mold that compromises their entire reason for existing as an alternative to the public colleges and universities.

The patterns of financing have, of course, been only one factor in the increasing homogenization of higher education. But whatever the causes, both the nation and the overall cause of higher education are badly served by measures that destroy our system's few remaining vestiges of diversity and pluralism. As long ago as 1971, the distinguished Report on Higher Education prepared by the Newman Commission and distributed through the U.S. Office of Education observed as its basic criticism that our "system of higher education as a whole is now strikingly uniform." The Commission found that college students have a choice:

> not . . . between institutions which offer different modes of learning, but between institutions which differ in the extent to which they conform to the model of the prestige university . . . . If . . . one believes that an important function of the higher education system is to offer alternative models of careers and roles, including those which challenge and change society, then the homogenization of higher education is a serious problem.

For students who will be frozen out of private colleges that are unable to admit anyone receiving personal federal aid, the message of this report is particularly unsettling. A student may be attracted to a private college or university precisely because of its distinctive environment and independent spirit, despite its higher tuition. But because of the student's or the parents' income level, federal assistance might be necessary for him or her to attend. What benefit is there to the student if that assistance is withheld? What damage is done to the possibility of providing every young man or woman who desires it a college education consistent with his or her own choice among all the educational models of social, intellectual, and spiritual life?

These thoughts on why independence matters to the nation's private colleges and their students are offered primarily to show that there are legitimate countervailing interests at stake that deserve a complete hearing in the understandable quest to extend civil rights jurisdiction to the uttermost limits. When no questions about those limits are asked, let alone thoughtfully answered, the nation pays a heavy price in terms of the variety and quality of American education that is available.

As observed by the Carnegie Council, "the special contributions of independent colleges and universities depend in large measure on their ability to operate as autonomous institutions, subject to a minimum of governmental control . . . . There is a danger that federal and state regulations may go so far as to deprive those institutions of the freedom and flexibility needed to perform their missions properly." 50/ Surely a way can be found to accommodate (1) the need for independent colleges to remain independent with (2) the rights of students both to financial aid and to choose their own kind of college education.

C. Special Concerns Under Title IX for the College with a Religious Mission.

1. The General Problem. Church-related institutions and other colleges with an essentially religious orientation have been deeply concerned since its

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50/ Quoted in Dallin H. Oaks, "Facing the Future: A Distinctive Role for the Church-Related College," National Congress on Church-Related Colleges and Universities, Notre Dame University, June 22, 1979.

enactment about the impact of Title IX on their overall religious liberty. There is a qualified exemption in the statute providing that the law does not apply when its application "would not be consistent with the religious tenets" of "a religious organization" which "controls" an educational institution. However, many colleges and universities which have strong institutional commitments to religiously based moral values are not protected by the exemption, because they are not formally "controlled" by a religious organization.

Even for controlled institutions, the exemption leaves the burden of proof on the college to convince the Department of Education that there is in fact a "specific tenet of the religious organization" 51/ at stake in a particular situation and that it conflicts with the application of some portion of the law or regulations. Because this procedure leaves questions of interpreting religious doctrine in governmental hands, its constitutionality as well as its wisdom is questionable.

With S. 2568 expanding the coverage of Title IX across an entire campus, even when there is no federal assistance other than aid to students, concerns about conflicts with religious liberty principles are correspondingly expanded.

Not only the religion clauses but the entire spirit of the First Amendment protects a private institution of higher education from being forced to redirect its distinctive educational mission and environment to meet ends chosen by government. In this sense, educational institutions share the fundamental values of the First Amendment with the press, with religious institutions, and with our political institutions, which thrive through the protections given free and robust political discourse. 52/

Within the protection of the First Amendment, church-related schools have played a particularly important role as "mediating structures" between the individual and

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51/ 34 C.F.R. § 106.12(b).

52/ *See* text accompanying nn. 78-84, *infra*.

the larger society, especially as the State has loomed larger in its role. Modern civilization is soaked through with a sense of anomie and alienation, heightened by feelings of helplessness against ever increasing concentrations of power in such "megastructures" as the boundless government bureaucracy, the business conglomerate, and the national labor union.[53] In the midst of all this, increasing attention is being given to the personal and the public policy significance of such "mediating" structures as families, neighborhoods, churches, and voluntary associations:

> Without institutionally reliable processes of mediation, the political order becomes detached from the values and realities of individual life. Deprived of its moral foundation, the political order is 'delegitimized.' When that happens, the political order must be secured by coercion rather than by consent. And when that happens, democracy disapears.
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> The attractiveness of totalitarianism . . . is that it overcomes the dichotomy of private and public existence by imposing on life one comprehensive order of meaning.[54]

Mediating structures are "the value-generating and value-maintaining agencies in society."[55] Therefore, when these structures are inactive, society must look to the megastructures — notably the State — as a source of values. The totalitarian State gladly and aggressively assumes that role. The democratic State, on the other hand, makes no claim to be a source of personal meaning and values, nor would we allow it to. That role contradicts the assumptions on which our entire political system rests.

The family is for many people the major mediating and value-generating institution within the private sphere.[56] Therefore, attitudes about family life, marriage, children, and the relationships between men and women are among the core

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53/ P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures in Public Policy (1977).

54/ Id. at 3 (emphasis added).

55/ Id. at 6.

56/ This subject is enlarged upon within the constitutional context in Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Social Interests, 81 Michigan Law Review 463 (1983).

attitudes of life. Church colleges and universities, freely chosen as private institutions by the students who attend them, have traditionally regarded attitudes about family life and related value questions as central to the concerns of their students. Thus these schools have, as matters of both educational and religious philosophy, played a vital role in augmenting their students' own family and religious life in the process of value formulation and value transmission regarding family-oriented matters.

Attitudes about marriage and family are only one example of many value laden subjects that play an important role in the community of a church-related college. There are many other ways in which these colleges assume the role of mediating structures in the lives of their students. In this role, church schools act very differently from public schools, because state schools are extensions of the democratic state — itself part of the larger megastructures.

In general, Title IX, as broadened by S. 2568, would tend to establish an official orthodoxy about value questions relating to the roles of the sexes in society, matters of sexual morality, and attitudes about marriage and family life. There are many strongly held views on these issues in contemporary society. They are far from the category of settled questions. On the contrary, they are exactly the kinds of issues Justice Jackson had in mind in his celebrated statement from the flag-salute case: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." 57/

Intrusive laws and regulations relating to family life and sex roles can be harmful to church-related colleges in two ways. One way is for the state to assume for itself the value transmission role by imposing, in a nearly totalitarian way, "one comprehensive order of meaning" about such personal questions. The other way is for the state

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57/ West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943).

to imply by its regulatory authority that the nation's official and legally enforced value position about the role of the sexes is one of unisex neutrality, which is itself a value position so potent that it seems to mark any contrary view as illegitimate. Either way, a chill comes over the campus atmosphere and the very soul of a church college is threatened. Church-related colleges and universities desire independence not so they can discriminate, but so they can be discriminating — about many of life's ultimate questions.

2. Illustrations of Specific Concerns. Consider now a few specific examples of the way Title IX, as broadened by S. 2568, inappropriately intrudes on religious and moral values. The current Title IX regulations appear to require schools to be blind to the occurrence of abortion or extramarital sexual activity in decisions relating to school policies or student discipline.[58] Yet many religiously oriented and other institutions believe there are serious moral principles at stake in such student behavior. Their commitment to these principles is unquestionably undermined by regulations that prohibit inquiries into or actions based upon marital or parental status, pregnancy or termination of pregnancy.[59]

It is unclear whether Title IX permits college teachers and counselors to talk with students about ways in which marriage may be compared to career choices or even personal student preferences. The regulations prohibit counseling students in ways that "permit or require different treatment of students" on the basis of sex.[60] They also require that when "substantially disproportionate" numbers of one sex choose voluntarily certain courses of study or are classified by counseling and vocational testing materials

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58/ 34 C.F.R. SS 106.21(c), 106.40(b)(1), 106.40(b)(5), 106.57(b) (1983).

59/ In addition, colleges which stress high moral values and modesty may object to regulations which prohibit separate sex education classes, 34 C.F.R. S 106.34 (1983), and separate physical education classes (although separating the sexes within a physical education class is permitted in sports which primarily involve physical contact). Id. at S 106.34(c).

60/ 34 C.F.R. S 106.36(b).

in particular courses or classifications, the school must take affirmative action to ensure that the disproportion is not the result of sex discrimination in academic or other counseling.[61/] The chilling effect of this legalistic approach on sound academic and career counseling is especially noticeable when that counseling is placed in the larger context of student-teacher conversations in a church-related college about life's goals and larger purposes. Are some career choices more compatible with marriage goals than others? If so, is that question off limits in counseling for students for whom it is an important issue? What if there are religious attitudes about the significance of marriage that enter the counseling environment?

Sex-segregated housing for single students is allowed up to the point of maintaining "separate living facilities." But this language is uncertain enough to make it difficult for institutions to know how to govern their affairs in this highly sensitive area.[62/] If, for example, women generally prefer dormitories with cooking facilities while men prefer dormitories with cafeteria facilities, how is a college housing office to ensure there has been no discrimination in dormitory assignments? Suppose a college administration prefers to have dormitory buildings or wings segregated on the basis of sex. Does that constitute "separate living facilities"? When in doubt on such matters of judgment and interpretation, who should have the burden of proving whether there is discrimination — the college or the government?

Church-related schools and other colleges holding strong value orientations are often troubled that federal agency procedures tend to allow the "judgment call" issues in the sex discrimination area to be resolved in favor of agency discretion. Justice White has aptly observed that "the word 'discrimination' is inherently . . . ambiguous."[62a/]

[61/] 34 C.F.R. § 106.36(c).

[62/] 34 C.F.R. § 106.32.

[62a/] Guardians Association v. Civil Service Commission of the City of New York, 103 S. Ct. 3221, 3227 (1983).

The particular term "sex discrimination" is even more ambiguous, because some distinctions between males and females are inherent in nature. Whether those distinctions should be the basis for conclusions of illegal "discrimination" is unavoidably a matter of subjective judgment. It is the established practice of Congress to delegate such discretionary decisionmaking to federal agencies, often pursuant to vague statutory language — of which Title IX is a notable example. The Supreme Court allows broad agency discretion, giving regulations the force of law so long as they are "reasonably related to the purposes of the enabling legislation." [62b/] Thus, as a practical matter, future innovations and requirements under the heading of sex discrimination in education are limited only by the imagination of the Department of Education.

This means that a matter of conscience and belief having importance to a small, private college, but which may easily seem trivial to others, may require expensive litigation to ensure protection. When such First Amendment interests as religious liberty are involved, however, the presumption should be the other way: the college's judgment should prevail unless a given practice is shown to have harmful discriminatory effects.

For example, a former Title IX regulation provided that an educational institution could not "discriminate against any person in the application of any rule of appearance." [62c/] Pursuant to this rule, HEW decided that dress and grooming codes could not require different hair lengths of men than of women. One church-related university made enough of the issue in a formal exchange with the Office of Education that a gender-based hair length standard was allowed under Title IX's religious

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[62b/] Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). See generally K. Davis, Administrative Law Treatise § 7.8 (2 ed. 1980 and Supp. 1982).

[62c/] 45 C.F.R. § 86.31(b)(5) (1976).

exemption.[62d/] In another case, it took a court ruling to invalidate the regulation as applied to a particular appearance code.[62e/] Eventually the regulation was rescinded; but the expense and effort in such cases has been enough to make independent schools very uneasy about the future prospects of needing to formally defend themselves when the procedural presumption is already against them. Whether the future issues involve regulating the content of textbooks or reviewing approaches to classroom instruction, the effect of being put so severely on guard simply has a chilling effect that subtly undermines a religious school's pursuit of its educational mission.

IV. Limitations on Federal Regulatory Power.

S. 2568 seems to assume there are no significant constitutional or policy reasons for restraining the reach of federal regulatory authority. However, there are several important reasons why Congress should consider the need for its own self-restraint before enacting this Bill, which proposes unusually bold extensions of federal power.

A. Limitations on the Spending Power.

The general rule regarding congressional authority is axiomatic under our theory of limited government: Congress must have some constitutional basis for its legislative enactments. Otherwise, this Bill could simply provide that no American shall discriminate against any other in any way. The authority for S. 2568 is obviously derived from the spending power, which gives Congress the right "to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[63/]

[62d/] Correspondence between Martin H. Gerry, Director, Office for Civil Rights and Dallin H. Oaks, President, Brigham Young University (1976).

[62e/] Trent v. Perritt, 391 F. Supp. 171 (D. Miss. 1975).

[63/] Grove City College v. Bell, 104 S.Ct. 1211, 1223 (1984) (emphasis added).

Reasonable people cannot quarrel, as a matter of public policy or logic, with the assumption that any governmental agency has the responsibility and the right to verify that public funds are spent for the purposes for which expenditures were authorized. This natural principle of accountability also assumes that "funds should not be expended in ways that run counter to legitimate government objectives, such as assuring that government property and facilities acquired with government financing are used without unlawful discrimination." [64/] However, in today's society, when virtually every public or private transaction is touched in some way by the ripple effects of federal spending, and when federal power seems far more potent than any other source of influence, there are enormous temptations to misuse the spending power. But if that power is manipulated to become a trojan horse in every office or conversation where the influence of federal spending is felt, it will quickly establish a unitary sovereignty that destroys crucial checks and balances by eliminating both federalism and the private sector.

Thus, the power to condition the receipt of federal funds on specified obligations is not unlimited, as both the Congress and the Supreme Court have long recognized. Congress has in the past been sensitive to the need to attach "reasonable" conditions to the receipt of federal funds. In enacting Title VI, and in subsequent civil rights legislation, Congress was careful to apply the regulatory scheme only to the specific program or activity receiving federal financial assistance, and to narrowly define the concept of recipient. [65/] Its purpose was arguably to ensure that the receipt of federal funds be accompanied by conditions that are directly and reasonably related to the objectives of the grant program itself.

[64/] D. Oaks, "Facing the Future: A Distinctive Role for the Church-related College," National Congress on Church-related Colleges and Universities, Notre Dame University, June 22, 1979.

[65/] See infra, text accompanying nn. 102-121.

The Supreme Court has also recognized substantial constitutional limits on the spending power. The most recent and most applicable formulation of the test establishing such limits comes from Grove City:[66/]

> Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. E.g., Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539, 67 L.Ed.2d 694 (1981). Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department s action may either take their BEOGs elsewhere or attend Grove City without federal financial assistance.

All of the operative terms in this test present problems for S. 2568. First, the conditions attached by the Bill to the receipt through student aid only of federal financial assistance by a private, independent college are no longer "reasonable." This is because removal of the "program specific" concept and the use of a virtually unlimited definition of "recipient" arguably destroys the needed rational connection between (1) the conditions imposed and (2) the purposes of the various forms of aid capable of triggering recipient status. It really is unreasonable to think that one federal grant to one student would alone justify the full burden of compliance with the intrusive regulations under these statutes.

Second, the conditions attached to the federal financial assistance under S. 2568 are very "ambiguous." Among many other major ambiguities,[67/] it is not at all clear which forms of federal aid have the Title IX regulatory burden attached.

Also, the combination of Grove City and S. 2568 make it possible that private, independent colleges and universities will become "obligated to accept" certain forms of federal financial assistance capable of bringing the institution under the rule of Title IX. For example, under S. 2568's definition of recipient, it is quite possible that a

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[66/] 104 S. Ct. at 1223.

[67/] See Section II, supra.

student receiving welfare-type benefits would trigger "recipient" status for the university that he or she attends. [68] Under these circumstances, a college might have no idea which of its students could, by the act of enrolling, subject the college to federal jurisdiction. [69] The college could therefore be "obligated to accept" the federal financial assistance with no realistic way to "avoid the requirements of the law." [70] For these reasons, S. 2568 may fail the spending power test explained in Grove City.

For its general statement of the scope of the spending power, the Court in Grove City cited Pennhurst State School & Hospital v. Halderman. [71] That case involved application of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (the Act). [72] Halderman, a minor, retarded resident of Pennhurst (a state-owned and operated facility for the disabled) sued in a federal district court class action alleging unsanitary, inhumane conditions in violation of her civil rights, and specifically her rights under the Act. The Court of Appeals found that the Act created substantive rights in favor of the mentally retarded, that mentally retarded persons have an implied cause of action to enforce those rights, and that conditions at Pennhurst violated those rights.

68/ See Section II.B., supra.

69/ It is doubtful that a college attempting to maintain its independence by refusing admission to students receiving general assistance payments could even identify such students. The federal agencies administering such programs, with the exception of the Department of Education, are prohibited by statute from disclosing identifying information. 5 U.S.C. § 552a(b). State agencies participating in federal welfare programs are also instructed to restrict such information to agency personnel involved in the administration of the welfare program. See, e.g., 7 U.S.C. § 2019 (food stamps). Without voluntary disclosure by the student, it is difficult to see how the college could identify the students receiving such aid for the purpose of excluding them. If students receiving aid other than student education grants and loans can trigger regulation of the university (a result arguably permitted by the language of S. 2568, see Section II.B.), then the university is caught in the position of indirectly receiving federal financial assistance which it cannot identify or avoid.

70/ Grove City, supra, 104 S. Ct. at 1223.

71/ 451 U.S. 1, 17 (1981).

72/ 42 U.S.C. § 600 et seq. (1976 ed. and Supp. III).

The contrary argument was that in receiving federal funds for the handicapped under the Act, the State had never obligated itself to the affirmative duties which the Court of Appeals had found; specifically, the right to "appropriate treatment" in the "least restrictive" environment. In analyzing whether receipt of funds under the Act carried with it these affirmative duties, the Supreme Court developed the following test:

> Turning to Congress' power to legislate pursuant to the spending power, our cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. . . . Unlike legislation enacted under § 5, however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . [emphasis added]. There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. . . . By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation. [73/]

Pennhurst also cited Fullilove v. Klutznick, [74/] which stated that the spending power requires Congress to impose conditions that are "narrowly tailored" to the achievement of the legislative goal. [75/] The Pennhurst and Fullilove tests pose some serious difficulties for S. 2568, again because the Bill is such a study in ambiguity.

For example, the language as presently drafted leaves it far from clear what a college must avoid to preserve its independence. A college could become a recipient of federal financial assistance without "knowingly" or "voluntarily" receiving any federal aid, by the unilateral actions of its students. There is no way to determine with certaintly who is a "recipient" under the terms of the Bill, nor which forms of federal

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[73/] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (emphasis added).

[74/] 448 U.S. 448 (1980).

[75/] 448 U.S. at 480.

financial assistance carry what consequences. It may not even be possible to avoid these consequences once they are determined.

These uncertainties are created as well as compounded by the way S. 2568 subjects each individual "recipient" to the jurisdiction of multiple federal agencies. As one scholar who examined the Bill observed, "Assistance of any kind to any part of any public or private enterprise will trigger all the civil rights regulations and enforcement procedures of all the cognizant federal agencies with respect to all other parts of the enterprise, however remote they may be from the part being aided." [76] Different federal agencies have established different tests for measuring compliance. Thus, for educational institutions to be aware of the expectations of the Education Department will no longer be sufficient. Moreover, "[m]any federal agencies have long since built into their antidiscrimination regulations and procedures various 'effects' tests, quotas and other 'outcome' standards that may foster reverse discrimination." [77] Some of these tests may have been established in an especially demanding regulatory context, such as racial discrimination, making it unclear whether those same tests will apply to other forms of discrimination as determined by agencies having different enforcement objectives. The net result of the Court's analysis in Grove City, Pennhurst, and Fullilove is that S. 2568 has great difficulty in satisfying the basic requirements for a valid exercise of the spending power. Those basic requirements include the need for reasonable and unambiguous conditions, voluntarily and knowingly accepted with a complete view of the consequences.

76/ C. Finn, "Civil Rights in Newspeak," Wall Street Journal, May 23, 1984.

77/ Id.

B. The Spending Power, The First Amendment, and "Unconstitutional Conditions."

There is an alternative line of reasoning which also acts as a limit on the spending power, known as the doctrine of "unconstitutional conditions." [78] Under this doctrine, governmental entities may not condition access to funds or other benefits in ways that force potential recipients to sacrifice a constitutional right in order to obtain the benefit. This is particularly true when the public benefit is vital. As explained by the Supreme Court:

> If the state may compel the surrender of one constitutional right as a condition of its favor it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence. [79]

Although this doctrine originally developed in the context of foreign corporations seeking to enter a state to do business, it has long since been applied in other contexts, including receipt of welfare-related benefits. [80]

The major constitutional provision which would, under the doctrine of unconstitutional conditions, limit the spending power in favor of independent colleges and universities is the cluster of freedoms associated with the First Amendment. The Supreme Court has been particularly adamant in its refusal to sustain conditions upon public benefits if they "inhibit or deter the exercise of First Amendment freedoms." [81] As expressed by two constitutional law scholars:

> Since independent colleges — especially church-related ones — are intimately involved in the assertion, cultivation, and

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[78] See L. Tribe, American Constitutional Law 510 (1978).

[79] Frost & Frost Trucking v. Railroad Comm'n, 271 U.S. 583, 594 (1926) (a case involving an attempt to require a private trucker to become a common carrier as a condition to using the highways, where the state had the acknowledged power to prohibit the use of the public highways in proper cases).

[80] Sherbert v. Verner, 374 U.S. 398 (1963).

[81] Id. at 405 (1963).

> transmission of First Amendment values, they are uniquely situated to avail themselves of the doctrine of unconstitutional conditions. Whatever additional constitutional rights might be relevant to the protection of various aspects of the life of a university community, it is clear that a variety of First Amendment values — freedom of speech, of association, and often, of religion — are central. Indeed, as one author has expressed it, the university is "the principal institutional focus of American intellectual life. . . . The university is, in sum, the single institution in American society that exists solely to nurture and pursue values enshrined in the First Amendment." 82/

And in one of the most oft-cited statements of the Supreme Court on academic freedom, Justice Frankfurter underlined the conditions that make universities protected fountainheads of pluralism: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the 'four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 83/ When this general interest is buttressed by genuine religious liberty interests, it is a matter of no small constitutional significance.

For those institutions whose very purpose is to nurture and sustain First Amendment values (newspapers, churches, and universities), regulation of the institution itself also creates an impermissible "chill" on the First Amendment rights of those within its institutional framework. The chilling effect of heavy regulation takes on increased significance when a private college nurtures religious values, even if it is not "controlled" by a religion. In addition, small, independent colleges and universities, often comprised of students who share many common values, reflect decisions by their students to exercise their rights to freedom of association by enrolling in such a school. This trilogy of First Amendment freedoms (speech, religion, and association) together with the private,

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82/ C. Durham & D. Oaks, supra n.44 at 76 (citation omitted).

83/ Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

independent status of such schools, means that the buffer zone protecting these freedoms should be quite large. If "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny," [84] then any regulation of institutions impacting upon freedom of speech, religion, and association would also require the highest level of scrutiny.

In summary, under the doctrine of unconstitutional conditions, Congress' power to attach limits on federal assistance to private colleges and universities is limited by the First Amendment. Such conditions must be narrowly tailored, and not have a chilling effect on First Amendment freedoms. This is particularly true where the federal financial assistance comes to the university in the obtuse fashion contemplated by S. 2568.

C. Federalism as a Limitation on Congressional Authority.

With respect to its effect on state and local governments, S. 2568 is intrusive to an extreme degree. As outlined by Assistant Attorney General Reynolds, the problem stems from the Bill's almost limitless definition of "recipient." The definition provides that "when Federal financial assistance is extended to a 'subunit' (not defined) of a larger 'entity' (not defined), the larger entity itself — whether it be public or private — can be viewed as the 'recipient' if it is deemed to have 'receive[d] support from' (not defined) the federal funds going to the subunit." [85] This definition covers all the subunits of a state if any subunit of the state receives any aid. "Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of federal intrusiveness into state and local affairs under H.R. 5490 [the House companion bill to S. 2568] seems to be virtually complete." [86]

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[84] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461 (1958).

[85] See n.18, supra.

[86] Id.

In addition to increased scope, the enforcement provisions for both governmental and private litigants are greatly expanded. Every state and local government entity will be subject to the jurisdiction of every federal agency which extends federal financial assistance to the state or one of its subunits.

The power of Congress with respect to state governments is not limitless. In National League of Cities v. Usery [87/] the Supreme Court struck down Congress' attempt to extend the wage and hour provisions of the Fair Labor Standards Act to state and local governments. Sensitive to concerns of state sovereignty, the Court drew from the Tenth Amendment an "affirmative limitation on the exercise of [congressional power under the Commerce Clause] akin to other commerce power affirmative limitations contained in the Constitution." [88/] This was grounded in a concern that the imposition of intrusive federal regulations on state governments would "allow 'the National Government [to] devour the essentials of state sovereignty.' " [89/]

This Tenth Amendment limitation on the Commerce Clause was further articulated in Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., [90/] which involved a pre-enforcement challenge to the constitutionality of the Surface Mining Control & Reclamation Act of 1977 (SMACRA). SMACRA required a regulatory program for surface mining to be proposed by the state, consistent with minimum federal standards, or adoption by the state of the federal program. The Court in Hodel developed a test for Tenth Amendment challenges to Commerce Clause statutes, and under that test upheld SMACRA:

87/ 426 U.S. 833 (1976).

88/ Id. at 841.

89/ Id. at 855 (quoting Maryland v. Wirtz, 392 U.S. 183, 205 (1968) (Douglas, J., dissenting)).

90/ 452 U.S. 264, 286-288 (1981).

> "[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " [91/]

For statutes that satisfy each prong of this test, a final inquiry requires weighing whether "the federal interest advanced is such that it justifies state submission." [92/]

Finally, in *EEOC v. Wyoming* [93/] the Supreme Court re-emphasized the *Hodel* test in a case involving a challenge (under the Age Discrimination in Employment Act of 1967) to a Wyoming statute requiring the retirement of state Fish and Game Department wardens at age 55. The Court upheld application of the Age Discrimination in Employment Act to the states. It distinguished *National League of Cities* based on the differing levels of intrusiveness, focusing on the third prong of the *Hodel* test.

Taking these three cases together, it is probable that S. 2568 would not survive a Tenth Amendment challenge.

First, the bill regulates the "States as States," satisfying the first prong of the *Hodel* test.

Second, at least with respect to Title IX and perhaps with Section 504 of the Rehabilitation Act of 1973, the bill regulates "matters that are indisputably attributes of state sovereignty." Although the Supreme Court has not clearly defined this concept,

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[91/] 452 U.S. at 287-238 (citations omitted; emphasis in original).

[92/] *Id.* at 288 n.29, citing *Fry v. United States*, 421 U.S. 542 (1975); *National League of Cities*, *supra*, at 856 (Blackmun, J., concurring).

[93/] 103 S. Ct. 1054 (1983).

education has without question traditionally been regarded as a matter of state sovereignty. 94/

Third, it is "apparent that the states' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.' " 95/ The Court explained in EEOC v. Wyoming, that this question depends "on consideratons of degree." 96/ S. 2568 involves a greater degree of impairment than any of the cited cases. Hodel merely involved a requirement that the state regulate surface mining according to a federal minimum standard. EEOC v.Wyoming involved application of a federal law regarding mandatory retirement, which left the states free to continue their own retirement policies, if they can demonstrate that age is a "bona fide occupational qualification." 97/

In the one case that sustained the Tenth Amendment challenge, the Court found that application of the Fair Labor Standards Act to the states would have the adverse impact of diverting state funds from other vital state programs to pay workers the federal minimum wage and overtime rates. The inquiry was not so much factual as legal; whether the federal legislation would have a direct and obvious effect on the ability of the states to allocate their resources. 98/

The Court in EEOC v. Wyoming also distinguished National League of Cities by noting that in National League of Cities the Court had found "a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decision

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94/ See, e.g., San Antonio Independent School District v. Rodriguez, 409 U.S. 822 (1973).

95/ Hodel, 452 U.S. at 287-288.

96/ 103 S. Ct. at 1062.

97/ Id.

98/ 426 U.S. at 851-852.

making. . . Nothing in this case, however, portends anything like the same wide-ranging and profound threat to the structure of state governance." 99/

It is apparent that the effects of S. 2568 exceed those of Hodel and EEOC v. Wyoming in its intrusiveness. It is comparable in scope to National League of Cities; in fact, both the scope and compliance burden are probably much greater. Therefore, S. 2568 would have an even greater effect on the ability of the states to allocate their resources.

The final criterion focuses on whether the federal interest is such that it justifies state submission. Neither EEOC nor Hodel analyzes this test in the majority opinions; in National League of Cities it was implicitly satisfied. The federal government obviously has a great interest in eliminating discrimination. Whether that interest exceeds its interest under the Fair Labor Standards Act in National League of Cities is unclear. But the analysis does not stop with identifying the interest. The means used to accomplish Congress' purpose must also be reasonably related to the interest at stake, considering, perhaps, the degree of actual discrimination involved and the past history of discrimination. On that issue the very limitlessness of S. 2568 together with the absence of evidence of new discrimination make the Bill susceptible to serious challenge.

In its general consideration of S. 2568 Congress might do well to consider the statement of Justice Black in Younger v. Harris:

> [O]ne familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system . . . in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 100/

99/ 103 S. Ct. at 1062.

100/ Younger v. Harris, 401 U.S. 37, 44-45 (1970).

The cases discussed here involve the Commerce Clause, but are clearly analogous to Congress' power under the spending power. Indeed the spending power has always been thought to be narrower than, or at most co-existent with, the Commerce Clause.[101/] Whether or not S. 2568 finds itself within the outer reaches of Congress' power, the grave policy concerns about such a serious intrusion into state sovereignty, so hastily enacted, ought to be reason for considerable reflection.

V. Recommendations and Amendments

The sponsors of S. 2568 correctly regard this as a time to reconsider, along with other statutes, Title IX. The nation has now had 12 years of experience since the initial enactment of Title IX, aided by considerable interpretative refinements through case law and the regulatory work of the Education Department under both Democratic and Republican administrations.

A. Redraft S. 2568.

This statement of testimony has outlined numerous reasons why broadening Title IX as proposed by S. 2568 is unwise and even dangerous. My first specific recommendation, therefore, is that the Bill as written be withdrawn and re-drafted in a way that responds to the many serious questions it leaves unresolved. That process will also allow a much needed opportunity to consider the need for other refinements and amendments in the law.

Through this means or, as an alternative, by means of specific amendments to S. 2568 as now written, consideration should be given to two particularly needed amendments in the existing law as interpreted by the Supreme Court in the Grove City case. These two proposed areas of amendment follow.

[101/] See L. Tribe, American Constitutional Law (1978); Fullilove v. Klutznich, 448 U.S. 448, 475 (1980).

B. Broaden the Religious Exemption in Title IX.

Earlier portions of this testimony have treated the reasons why Title IX is an especially harmful intrusion into the religious liberty interests of church-related colleges and universities. The exemption now contained in the statute is so narrowly drawn that only those colleges legally "controlled" by a religious organization are entitled to consideration. Religiously oriented institutions of higher education having looser affiliations with a particular church should be fully entitled to this same protection, as should schools with other established educational missions having an explicit religious foundation.

Both the need for a broader religious exemption and the kind of exemption that might be considered are illustrated by the case history of a problem that arose in 1978 between Brigham Young University and the Justice Department.

After investigating an individual complaint, the Justice Department publicly announced its intention to bring suit against the university for violating the sex discrimination provisions of the Fair Housing Act. The university required single students in off-campus apartments to live in sex-segregated apartment buildings, a practice which on its face violated federal law. The Justice Department told the university it had no intention of forcing single students of the opposite sex to share bedrooms or apartments. However, the university's president was not comforted by this assurance, because he saw no legal distinction that would permit a landlord to discriminate on the basis of sex in assigning students to a particular apartment, but prohibited such discrimination in assigning students to a building or one of its wings. The university claimed exemption from the law on First Amendment religious liberty grounds.

Editorials in national newspapers and a vocal public outcry supported the university's position. Said the Los Angeles Times, "The threatened suit appears an abrasive, meddlesome intervention in a situation where the discrimination alleged is more theoretical than real, and where the risk of governmental intrusion in the area of religious freedom is more real than theoretical."

The Justice Department ultimately entered into a settlement agreement with the university, which allowed sex-segregated housing by individual building for single students because of the substantial religious values the department came to recognize. Significantly, the formal agreement expressly applied also "to other educational institutions which, on the basis of religious or moral principle, provide for the sexual separation of their single students in housing."

Title IX, of course, does not recognize "religious or moral principle" as a basis for legitimate distinctions based on gender, unless the college is controlled by a church. The statute could, and should, recognize the same broader religious liberty interest as the Justice Department recognized, once it looked seriously at the impact of a law having purposes and characteristics very similar to Title IX.

If there were to be serious interest in this proposal on the part of Congress, AAPICU and other organizations representing the interests of church-related colleges (and perhaps church-related elementary and secondary schools) would be pleased to be of assistance in considering specific language.

C. Amend the Definition of "Recipient" to Exclude Colleges Receiving No Direct Federal Assistance and Whose Students Receive No "Campus-Based" Benefits.

In the Grove City case, the Supreme Court concluded as a matter of statutory interpretation that federal assistance to students triggers the application of Title IX, even when a college receives no direct federal aid. The statute itself prohibits sex discrimination "under any education program or activity receiving Federal financial assistance." 102/

102/ 20 U.S.C. § 1682 (emphasis added).

The Supreme Court had the difficult task of deciding key issues under Title IX in the face of ambiguous statutory language, sketchy legislative history, and conflicting judicial and administrative signals. The impact of the Court's holding that students receiving federal grants triggers Title IX coverage was moderated for schools like Grove City College by the Court's determination that statutory coverage must be limited to the school's financial aids program. The majority's resolution of the two issues of "recipient" and "program specificity" could be viewed as a fair result — something of a compromise — in the unique case of a private school which receives no other federal aid. If S. 2568 is enacted as proposed, however, the "compromise" will end. Hence the need to consider the unique problem of the college that has contact with federal funding only through student aid.

What makes the resolution of the student aid question so difficult is that aid to students is in a hybrid catagory. Direct grants to a school (even if channelled first through a state agency) clearly trigger coverage as federal assistance to the school. On the other hand, welfare and other general assistance benefits to individuals do not presently trigger coverage [103] even when used so as to benefit an entity such as a school. Student aid lies somewhere in between these two typical types of federal aid. Students are obviously the primary intended beneficiaries of student aid. It is generally accepted that by educating more of its citizens, the country as a whole is benefitted. In addition, educated individuals are more likely to have higher incomes — possibly repaying with interest the nation's investment in student aid through higher tax revenues, and being less likely to be future welfare burdens. Students are not encouraged to achieve higher levels of education simply to keep the schools solvent. At the same time, of course, schools do benefit from aid to students. Moreover, student aid is earmarked to be used only in connection with education.

103/ See Section II.B., supra.

The earlier reference to problems relating to the First Amendment's Establishment Clause [104/] suggests two helpful perspectives on this problem. First, the Supreme Court has long distinguished between "direct" and "indirect" aid to religious schools in considering alleged violations of church/state separation. "Indirect" in this sense has usually meant that a specific benefit earmarked for educational purposes went to a student's family rather than to the school he or she attended. Benefits of this indirect type are the only ones to have withstood Establishment Clause challenges. These cases do make clear that the direct-indirect distinction is both meaningful and workable.

Second, for reasons explained previously, [105/] the "recipient" status of church-related colleges whose students receive federal assistance may itself be a violation of the Establishment Clause. When considering the applicable constitutional tests, one finds that a critical issue is whether the funds will be spent for a secular purpose. In the context of student aid, the answer to that question depends on who is spending the money. When a student receives a federal grant or loan, the student may spend the money for a variety of education-related expenses, from food and lodging to tuition. Costs other than tuition are frequently high enough in relation to grant amounts to consume all of the student's federal funds. Such costs may well be incurred off campus. It would not be appropriate in such a circumstance to evaluate the secular purpose or source of funds for that student's payment of tuition to a church-related college, because the constitutional issue is whether the school uses governmental funds for non-secular purposes. The entanglements of accounting and metaphysics in this situation seem a bit silly, because a moment's reflection about the problem makes it clear that the student is both the receiver and the expender of the federal money. In addition, of course, there is

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[104/] See Section II.E., supra.

[105/] Id.

the risk that an Establishment Clause violation is actually involved in the notion that student aid makes a recipient of a church-related college. The obvious way to remove this risk is to clarify the law so that it regards the student as the final recipient.

Another helpful approach to the student aid question is found in the framework established by Congress under Title VI. The Supreme Court evidently ignored this guidance in its resolution of the student aid question in Grove City. Since Title IX's legislative history is virtually silent on the student aid question, congressional intent under Title VI as a directly analogous statute may be appropriately relied upon. 105a/

Congress made absolutely clear in the enactment of Title VI that "ultimate beneficiaries" of federal assistance were not covered by Title VI. Senator Humphrey stated that "Title VI will not authorize imposition of any requirements on the ultimate beneficiaries of . . . welfare payments," and "Title VI would not authorize the withholding of any of these direct payments on the ground that the recipient engages in racial discrimination in connection with his business or other activities." 106/ Attorney General Robert Kennedy explained this limitation in connection with the overall scheme of Title VI: "title VI is limited in application to instances of discrimination against the beneficiaries of federal assistance programs." 107/ This statutory scheme seems to have particular application in the case of student aid: the civil rights statutes are meant to insure that the intended beneficiaries are not discriminated against, but beneficiaries are free to choose to attend the school of their choice. 108/

105a/ See n.6, supra.

106/ 110 Cong. Rec. 6545 (1964). This understanding of Congress' intention is reflected in current regulations. See text accompanying nn. 25-27, supra.

107/ 110 Cong. Rec. 10076 (1964) (letter to Senator Cooper) (emphasis added).

108/ See Comment, Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof", 78 Mich. L. Rev. 608, 613-17 (1980).

Not only does the legislative history indicate that Congress did not intend an ultimate beneficiary to be subject to Title VI's requirements, but also it is clear that the primary beneficiary was not to trigger Title VI coverage for another person or entity with whom the beneficiary might have dealings (and who thus would "benefit" from the federal assistance). The original legislation would have broadly covered "direct or indirect financial assistance." [109] After holding hearings which considered the scope of this coverage of "indirect" assistance, [110] the "indirect" application of Title VI was removed and replaced with the narrower "program or activity receiving federal financial assistance." [111] Senator Humphrey further clarified that "[i]t is irrelevant, to the purpose of these acts, what the recipient does with the money he receives. His employees, the customers of his business, or other persons with whom he deals, are in no sense participants in or beneficiaries of these Federal programs." [112] For the same reasons, it should not matter that a school benefits from a student beneficiary of federal aid.

Central to these limitations intended by the 88th Congress is an implicit concern regarding the unfairness of harming a student on federal aid in order to coerce the school. The beneficiary of the aid should be the one protected, to insure that he or she is not denied the benefits of the federal assistance as a result of discrimination. Closely related to this point, and another strong indicator that student aid should not trigger coverage of a private school, was Congress' strong concern that federal assistance only be cut off in the particular program or activity where discrimination was found.[113] Yet, if student aid is the only source of coverage, the only available sanction is to terminate aid to all students, even where discrimination is limited to a particular part of the school.

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[109] H.R. 7152, 88th Cong., 1st Sess., 109 Cong. Rec. 11252 (1963).

[110] See Civil Rights: Hearing on Miscellaneous Proposals Regarding the Civil Rights Of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 659 (1963).

[111] H.R. 7152, 88th Cong., 1st Sess. (Comm. Print, Oct. 2, 1963).

[112] 110 Cong. Rec. 6545 (1964).

The Supreme Court in Grove City, while apparently disregarding the evidence of the approach intended by Congress as set forth above, stated that "[t]he drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage."[114] As its support for this statement, the Court cited a floor statement of Senator McClellan.[115] That the Court would cite this as support for its statement is at best disappointing. Senator McClellan's view of Title VI was that it was "clearly unconstitutional."[116] Senator McClellan felt Title VI might "destroy the vast system and network of programs and activities by which the Federal Government is providing essential financial aid and assistance to State and local government."[117] First, rather than support the proposition that Congress anticipated student aid would be covered, Senator McClellan's remarks indicate that Congress was not totally sure what would be covered.[118] Second, in accordance with the Senator's concerns that all grants-in-aid programs would be covered under Title VI, he summarized all federal grants-in-aid programs existing at that time in order to show "what these Federal aid programs mean to the people of this Nation."[119] It was this list the Supreme Court in Grove City cited to show an intention that student aid be covered. Finally, as further evidence that this list is hardly evidence of congressional intent on the issue of student aid, Senator McClellan's list included several types of general assistance welfare benefits, [120] which Congress clearly did not intend to be covered. [121]

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[113] See Section II.C., supra.

[114] 104 S.Ct. at 1218.

[115] Id. at n.15.

[116] 110 Cong. Rec. 13378 (1964).

[117] Id.

[118] See id. at 13382.

[119] Id. at 13385, 13387.

The available legislative history under Title VI supports the view that student aid should not trigger Title IX regulations. This conclusion also corresponds to the sensible approach to Title VI coverage as originally intended by Congress. It is therefore proposed that S. 2568 be amended to remove from the definition of "recipients" those educational institutions which receive no direct federal aid and whose students receive no "campus-based" student aid. All other student aid programs are "campus-based," meaning that the educational institution involved receives the federal funds itself, has some discretion in making student awards, or is in some other way involved in more than a nominal and indirect way. This proposal might more clearly establish that the student aid is "indirect" if the Education Department were to establish local service centers at which students could make applications for federal assistance to be used at an institution that merely certifies such requirements as enrollment and satisfactory progress.

One of the advantages of this proposal is that it uses the "recipient" definition to allow for the special and limited circumstance of independent colleges receiving no direct aid. Thus, no exception is made to whatever Congress chooses to do with the problem of program specificity — which was, after all, the issue from the Grove City case that led to the introduction of S. 2568.

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[120] Id. at 13388-89.

[121] For example, Senator Kuchel stated that "[n]othing in Title VI would authorize cancellation of Federal checks for social security or veterans' pensions or agricultural price supports because the State in which recipients live discriminates in the administration of federally supported programs. Yet some who seek to mislead the public have said there is." Id. at 6563.

00001

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Abilene Christian University	Texas	4518
Academy of the New Church	Pennsylvania	159
American Baptist Theological Sem	Tennessee	177
Anderson College	South Carolina	1048
Andrews University	Michigan	2851
Anna Maria College	Massachusetts	1655
Averett College	Virginia	916
Azusa Pacific University	California	2467
Baker University	Kansas	839
Baptist College at Charleston	South Carolina	2170
Baylor University	Texas	10473
Becker Junior College	Massachusetts	516
Belhaven College	Mississippi	938
Benjamin Franklin University	D.C.	408
Berea College	Kentucky	1532
Berry College	Georgia	1499
Bethany Nazarene College	Oklahoma	1400
Bethel College	Kansas	661
Biola University	California	3096
Birmingham-Southern College	Alabama	1553
Bridgewater College	Virginia	894
Brigham Young Univ. - Hawaii	Hawaii	1607
Brigham Young University	Utah	29695
Buena Vista College	Iowa	1403
CBN University	Virginia	350
California Baptist College	California	660
Calvin College	Michigan	3807
Campbell University	North Carolina	3052
Capitol Institute of Technology	Maryland	821
Carroll College	Wisconsin	1380
Catawba College	North Carolina	987
Central New England College	Massachusetts	306
Chowan College	North Carolina	1087
College of Insurance	New York	1622
College of the Southwest	New Mexico	204
Columbia Bible College	South Carolina	877
Concordia Teachers College	Nebraska	1062
Cumberland College	Kentucky	1747
Dallas Baptist College	Texas	1337
Divine Word College	Iowa	99
Dordt College	Iowa	1077
Dr. Martin Luther College	Minnesota	725
Dropsie University	Pennsylvania	42
Eastern Nazarene College	Massachusetts	841
Eckerd College	Florida	1051
Emory and Henry College	Virginia	769
Eureka College	Illinois	537

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ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Flagler College	Florida	981
Friends University	Kansas	813
Furman University	South Carolina	3105
Georgetown College	Kentucky	1211
Grace College of the Bible	Nebraska	312
Grand Canyon College	Arizona	1257
Greensboro College	North Carolina	585
Grove City College	Pennsylvania	2200
Hanover College	Indiana	994
Hardin-Simmons University	Texas	1948
Hebrew Union College	Ohio	145
Heidelberg College	Ohio	840
Hillsdale College	Michigan	1044
Houston Baptist University	Texas	2688
Howard Payne University	Texas	1123
Illinois Benedictine College	Illinois	2362
Indiana Institute of Technology	Indiana	557
International College	California	696
International Fine Arts College	Florida	267
Jamestown College	North Dakota	616
Johnson and Wales College	Rhode Island	4695
Judson College	Illinois	414
Kansas-Newman College	Kansas	759
King College	Tennessee	429
Lenoir-Rhyne College	North Carolina	1382
Liberty Baptist College	Virginia	3386
Limestone College	South Carolina	1536
Loma Linda University	California	5157
Louisburg College	North Carolina	717
Louisiana College	Louisiana	1049
Loyola College	Maryland	6182
Malone College	Ohio	872
Manhattan College	New York	4841
Maria Regina College	New York	508
McKendree College	Illinois	750
McPherson College	Kansas	496
Mercer University	Georgia	2950
Meredith College	North Carolina	1615
Mid-America Nazarene College	Kansas	1218
Midway College	Kentucky	349
Milwaukee School of Engineering	Wisconsin	2536
Mississippi College	Mississippi	2775
Missouri Valley College	Missouri	480
Mount Saint Mary's College	Maryland	1696
Mount Vernon Nazarene College	Ohio	1027
National College	South Dakota	3026
National University	California	6824

ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Nichols College	Massachusetts	992
North Carolina Wesleyan College	North Carolina	932
Northrop University	California	1445
Northwest Nazarene College	Idaho	1221
Northwestern College	Iowa	891
Northwestern College	Wisconsin	269
Northwood Institute	Michigan	2119
Oakland City College	Indiana	562
Oakwood College	Alabama	1418
Ohio Northern University	Ohio	2625
Oklahoma Baptist University	Oklahoma	1416
Oklahoma Christian College	Oklahoma	1614
Oklahoma City University	Oklahoma	3158
Olivet Nazarene College	Illinois	1907
Oral Roberts University	Oklahoma	4024
Our Lady of the Lake University	Texas	1577
Pacific States University	California	800
Pacific Union College	California	1592
Palm Beach Atlantic College	Florida	656
Park College	Missouri	3179
Parks College	Colorado	892
Parks College of St Louis Univ.	Illinois	1029
Patten College	California	143
Peace College	North Carolina	454
Pepperdine University	California	6499
Point Loma Nazarene College	California	1870
Principia College	Illinois	788
Ricks College	Idaho	6539
Robert Morris College	Pennsylvania	5689
Rockford College	Illinois	1469
Roosevelt University	Illinois	6685
Rose-Hulman Institute of Tech.	Indiana	1322
Saint Augustine's College	North Carolina	1581
Saint Francis College	Pennsylvania	1565
Saint John's University	Minnesota	2028
Saint Joseph's College	Indiana	963
Saint Mary's College	Minnesota	1404
Saint Mary's College of Calif.	California	2956
Saint Mary's University	Texas	3311
Salve Regina - Newport College	Rhode Island	1961
Samford University	Alabama	4161
School of the Ozarks	Missouri	1293
Sierra Nevada College	Nevada	212
Simpson College	California	306
Southern Methodist University	Texas	9156
Southern Missionary College	Tennessee	1801
Southwestern Adventist College	Texas	712

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ENROLLMENT OF AAPICU MEMBER INSTITUTIONS

Southwestern College	Oklahoma	51
Sterling College	Kansas	394
Taylor University	Indiana	1460
Tiffin University	Ohio	510
Trevecca Nazarene College	Tennessee	972
Trinity Christian College	Illinois	440
Trinity College	Illinois	556
Truett-Mcconnell College	Georgia	852
Union College	Nebraska	1024
Union University	Tennessee	1374
University of Dallas	Texas	2684
University of Mary Hardin-Baylor	Texas	1170
University of Richmond	Virginia	4411
Valparaiso University	Indiana	4251
Villanova University	Pennsylvania	11716
Warren Wilson College	North Carolina	535
Wayland Baptist University	Texas	1469
Wentworth Institute of Tech.	Massachusetts	3737
Westminster College	Utah	1233
Westminster Theological Seminary	Pennsylvania	422
Wheaton College	Illinois	2490
Whitworth College	Washington	1802
William Jewell College	Missouri	1569
Wingate College	North Carolina	1481
York College of Pennsylvania	Pennsylvania	4364

Senator HATCH. If we can begin.

I am sorry, President Roche, we will turn to you at this time, and take your testimony.

STATEMENT OF GEORGE ROCHE

Mr. ROCHE. Thank you very much, Mr. Chairman.

I also would like to extend the request that the full text of my written remarks be included.

Senator HATCH. Without objection. We will do that for everyone who is here today. We will put the full text into the record.

Mr. ROCHE. Thank you.

My credentials to testify on this legislation are really not so much personal as they are institutional. As president of Hillsdale College in Michigan, I have the privilege of appearing today on behalf of an institution which enjoys an unparalleled 140-year record of commitment to individual dignity, equal opportunity, academic freedom, limited government and the self-responsibility of free men and women associating themselves to achieve their purposes in private, voluntary ways.

In particular, I believe Hillsdale can submit for your consideration the sobering lessons of its 9-year ordeal of litigation and bureaucratic harassment under what I believe to be a tortured interpretation of title IX—an ordeal that could be reenacted in virtually thousands of places in our social order if this particular piece of legislation now under examination should become law.

S. 2568 has been impressively titled the "Civil Rights Act of 1984." Certainly this title demands our respectful attention. After all, it was just 30 years ago this month, only a few hundred yards from where we are now, that civil rights received an historic affirmation when the U.S. Supreme Court handed down its ruling in *Brown* v. *the Board of Education*.

The self-evident truth that all men are created equal, proclaimed by Jefferson and the Declaration of Independence and pushed forward another yet inconclusive step by Lincoln in the Emancipation Proclamation, gained new meaning and force for Americans of all colors and both sexes in the 1954 *Brown* decision.

The wake of Federal, State, and local government power was decisively shifted in one stroke on that May morning—shifted at long last away from the side of unjust, unequal treatment of persons according to irrelevant labels and categories, over to the just, right, and moral side of impartial treatment, individual merit, and equal opportunity.

The ensuing three decades have been a long road of implementation for that original color blind principle of the *Brown* decision.

There have been other legislative and judicial milestones along the way—and some moments in which we can be justly proud as a nation. There also have been, unfortunately, a number of wrong turns in the road, moments of losing the clear principle and slipping back to the old injustice under new disguises.

There have even been moments when the very principle of equal rights for all has been violated, turned completely upside down, in the name of equality itself. As patriotism and the flag can sometimes become the last refuge of scoundrels, so the rhetoric of civil rights is sometimes appropriated by the power hungry and the seekers of special privilege through Government intervention on their behalf.

All of us who cherish the genuine article called civil rights and equal treatment bear the obligation of special vigilance against these counterfeits, counterfeits which both dishonor the concept of equality and which visit very real harm upon individuals in our social order.

Mr. Chairman, after careful study of the proposed legislation, I would have to say with sadness that to call this bill the Civil Rights Act of 1984 reflects no truth in labeling.

The bill would not enforce civil rights, but civil wrongs. These wrongs would be perpetrated upon institutions both large and small, both public and private, throughout our society. Schools and colleges, hospitals and clinics, agencies of State and local government, large corporations, and the corner grocery store, all would be subjected to vague antidiscrimination fishing expeditions by Federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundaries, even between one Federal enforcement office and another.

The financial, administrative, and psychological cost of doing business and delivering necessary services would be significantly increased for all the entities I have named.

In the end, the burdens, the penalties and the inconvenience would rest most heavily on the individual citizens who look to these entities for services—and as usual, the citizens who are the most disadvantaged would feel the effects sharply. More often than not, these would be members of racial minorities, women, handicapped, the elderly—the very persons that this bill purports to protect.

And for what? To show that no one is discriminated against, that no one is treated unfairly. The goal is a noble one, but there are already ample statutes, enforcement powers, and court rulings on the books, to see that goal progressively better realized.

There comes a point at which granting ever broader enforcement powers to government and imposing ever more stringent reporting and compliance requirements on our public and private institutions, begins to become counterproductive. That point has clearly been reached with the bill which is presently under consideration.

Prof. Harvey Mansfield of Harvard recently put it quite clearly when he said that many affirmative action programs, and other antidiscrimination activities of government have become in the 1980's attempts to kick down a door which is already open. That kind of kicking, blindly continued in response to interest group pressures, or rhetorical abstractions, rather than in proportion to genuine need, is bound to hurt someone.

In this case, I submit that it hurts both those who are in the process of passing through the open door of equality and opportunity, and those officials who are working in good faith to hold the door open, and if the kicking continues, it would finally hurt the very structure of the door itself.

That is to say, this blind pursuit of social perfection, this snowballing aggrandizement of Federal power and proportionate subjugation of every other institution to that power, is beginning to weaken in a very real way, the pluralism, the diversity, and broad-based institutional stability of American life, the stability and adaptability that have been the source of our marvelous openness and youthfulness as a society for over two centuries.

Now, in an election year rush, the present legislation has been drafted in breathtakingly broad terms—whether by design or carelessness, I have no idea. Now the further rush seems to be, even according to such impartial sources as the Washington Post, an attempt to push through this legislation, without careful consideration of the ramifications involved.

Taking stock of the Federal bureaucratic aggrandizement that is certain to flow from enactment of the bill in its present form, and of the corresponding congestion and demoralization within many other institutions thus subjected to the heavy hand of bureaucratic monitoring, I think we can say that the cure being proposed here may be worse than the disease, if in fact the diagnosis is in any case correct.

Frankly, I have to disagree with the diagnosis as well. Judging by the yardstick of limited government laid down in the Declaration and the Constitution, judging by any measure of a healthy balance between the public and private sectors in a free society, I believe we must conclude that the legislative action in response to the *Grove City* decision ought to be exactly the opposite of what the present bill intends.

Sponsors of this legislation have made a great point of "program specificity" in the *Grove City* case. But the central issue is not program specificity. It is the other half of the *Grove City* decision, much less noted in the press and here on Capitol Hill, which urgently needs to be overturned.

I refer the unanimous holding of the Court to the effect that something called "indirect aid" to a college or university occurs when an institution accepts from one of its students, customers or clients, a dollar which that private individual received from some Federal assistance program. This "indirect aid," the Court ruled, subjects the recipient institution to Federal control every bit as much as the institution's own direct acceptance of Federal funds.

I believe that it is difficult to overstate how pernicious and how widespread would be the effects of allowing such a doctrine to stand as the law of the land, let alone extending that doctrine through the present bill to cover vast new areas of activity which were previously understood to be private.

One of the great sources of strength for America has been our status as an open society. Within that society the individual has been free to provide for himself and his family, to compete with others, or to combine with them in private voluntary associations.

We have been free to support those professions, businesses, schools, hospitals or churches which best met our individual needs and preferences. In other words, we have prospered with competition and voluntary association, with the private sector in all of its diversity. Sweeping away all distinctions between the private and public sectors would threaten the political and economic and social success we have achieved.

Limited government is the very cornerstone of our American system. Limited government means that most of the institutions and most of the decisions in a society remain private and voluntary, not public and coercive. The "indirect aid" formula advanced under Title IX and affirmed by the Supreme Court in *Grove City* v. *Bell,* effectively holding that every dollar which had ever passed through Federal hands continues to carry Federal control with it wherever it is subsequently spent, makes a mockery of the limited government idea. It goes a long way toward erasing any meaningful distinction between what is public and what is private in this country.

That the Supreme Court should have upheld this doctrine without a single dissenting vote is disturbing evidence of how lightly the principles of the Declaration of Independence are regarded today, even by the constitutional bodies charged with their defense.

That both Houses of Congress are now moving with what I can only describe as ill-considered haste to take up legislation for extending the "indirect aid" doctrine beyond education into other areas of American life, is still more depressing.

Let me turn for just a moment, Mr. Chairman, to Hillsdale College's experience over the past decade, under the impact of precisely the kind of legislation which the present bill would vastly extend.

Hillsdale College has for 140 years shunned both Government assistance and Government control to fulfill its founders' purpose of offering a liberal arts education untainted by the restrictions on free inquiry which inevitably accompany reliance on Government support.

Founded by Free Will Baptist abolitionists in 1844, Hillsdale has always had a vigorous open admissions and open employment policy. The first woman in Michigan, and the second woman in the United States ever to receive a bachelor of arts degree was an 1852 Hillsdale graduate. Blacks were also among Hillsdale's first graduates, nearly a century before it came to Washington's attention that there was a problem in this area.

Yet despite this record of absolute independence from Government funding of any kind, and despite this exemplary record of nondiscrimination and equal opportunity—a record which has never been challenged by the Government, or indeed, by anyone else—Hillsdale has found itself since 1975 defined as an institution receiving Federal aid through the farfetched semantic definition I described a moment ago.

Hillsdale's alleged status as an institution receiving Federal aid is based on our enrolling students who receive Federal grants and loans as individuals, and then applying those funds toward their tuition at Hillsdale.

When this pretext for extension of Government control over our affairs as a private college was first put forward nearly a decade ago, the Hillsdale College Board of Trustees formally resolved to resist the intrusion by all means that were available to us.

Hillsdale was the original litigant in what subsequently came to be called the case of *Grove City College v. Bell*. As mentioned earlier in my testimony, the title IX "indirect aid" pretext for Government intervention in the affairs of Grove City College and Hillsdale College was finally upheld by the U.S. Supreme Court earlier this year.

That ruling appears to present Hillsdale with a stark choice. We can either sign a compliance form acknowledging that we are subject to Federal control—in effect, a blank search warrant authorizing widespread bureaucratic intrusion into our records and into our decisionmaking processes, an obligation for Hillsdale to be considered guilty until proven innocent, even in the absence of any allegations against us. Or we have to disengage from the national defense student loans, the basic educational opportunity grants, and the other student assistance programs in question, at significant potential hardship to hundreds of our students and major financial jeopardy for the college.

We estimate that as many as 300 of Hillsdale's 1,000 students might be affected by such a disengagement, at a total cost approaching $1 million a year.

Yet Hillsdale's response, voted unanimously by our board of trustees on May 11 of this year, remains consistent with our stand for principle since 1844. We still stand by our refusal to sign the compliance forms when and if they are next presented to us. And if such a refusal makes it necessary, we shall cease accepting from any student tuition dollars with Federal strings attached. We shall endeavor to make available, to any student thereby deprived of Federal aid, equivalent funds from private sector sources.

The Supreme Court's interpretation of title IX as justifying Federal control over any institution where individual aid recipients spend their funds, is an Alice-in-Wonderland attempt to police discrimination where no discrimination has been alleged.

All of the dislocations, burdens, injustices, and hardships which I have hypothetically described in reference to the likely effects of the bill you are now considering are now already on Hillsdale's doorstep as imminent realities.

Yet the fact remains that Hillsdale has been extending equal opportunity to women and blacks since well before the Civil War, and that its record in this regard has never been disputed by the Government.

Ironically and tragically, by forcing Hillsdale to warn its students away from accepting Federal tuition aid, as the price of preserving our independence from Government control, the *Grove City* ruling—and still more in the proposed legislation—would threaten to narrow the very conditions of equal educational opportunity which such legislation purports to defend.

Speaking again simply for the one small institution where I am associated, I can state that Hillsdale is determined that neither the Court ruling nor the proposed legislation will actually have such a discriminatory effect in our case. We are committed to replacing these lost Federal dollars with equivalent private resources made available by fair-minded individuals throughout the country who have rallied around in increasing numbers since this case began 9 years ago.

The legislation before this subcommittee may pass, or it may fail of passage. Based on the election year mood that seems to prevail, I am not sanguine that the legislation will be rejected. Nevertheless, we at Hillsdale hope to make it clear by our example that there is another path which the Americans can take. The principle of private independence from public intervention, though severely set back in Congress and in the courts, can still find ultimate defense in the marketplace.

It is this defense to which Hillsdale College will turn if our next round of rejection of the title IX compliance forms makes it necessary. We will then set out to make enrollment at Hillsdale accessible to students of every economic background with the sole support of dollars earned in the free economy and voluntarily donated to this private institution.

Ultimately the question comes down to our asking "what sort of society do we want?" If we have no objection to a directed and regulated society, then there will be no objection to the bureaucracy operating the way it does, often making its decisions administratively rather than by public consent in elective chambers. There can be no objection to it using its powers to discriminate against all alternative philosophies and all alternative ideas of service if what we want is a regulated and directed society. Nor can we object to seeing bureaucrats as those who make the decisions, defining what constitutes an adequate education, or appropriate health care. We cannot complain about these things if what we want is a regulated and directed society. And no protest can be made when we see every passing craze and unbalanced ideology foisted into our service institutions in the name of "progress."

I repeat: No complaint can be made if what we want is the directed and regulated society. If, on the other hand, we seek a society in which men and women make their own decisions, and have the right to choose institutions and services which are compatible with their own deeply held convictions, then we must sharply limit the power of the governmental regulatory agencies, and put that power back in the hands of the American people.

Do the American people wish to lead their own lives and make their own decisions, or do we want a Washington bureaucracy to control our lives and make our decisions for us? That is obviously a rhetorical question and the answer is self-evident.

Accordingly, Hillsdale will continue to contest the extension of arbitrary and capricious bureaucratic interference with the private affairs of individuals who freely choose to attend our college. and with the legitimate sphere of decisionmaking of the college itself. By the same principle, I urge in the strongest terms that this subcommittee act unfavorably on the misconceived, misnamed, and dangerous legislation now before them. At a minimum, and as a suggestion at least of the amendment to the present legislation, I would urge exemption from the "indirect aid" provisions of this legislation for nondiscriminatory private higher education.

I thank the Chairman and the members of this body for this opportunity to present my views and those of the college. I welcome any questions that you might have.

[The prepared statement of George Roche follows:]

PREPARED STATEMENT OF GEORGE ROCHE

I appreciate the opportunity to testify before this subcommittee this morning. The bill under consideration, S. 2568, the "Civil Rights Act of 1984," is meant to clarify the intent of, and close certain perceived loopholes in, several existing statutes including Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964.

My credentials to testify on this legislation are not so much personal as institutional. As president of Hillsdale College in Michigan, I have the privilege of appearing today on behalf of an institution which enjoys an unparalleled 140 year record of commitment to individual dignity, equal opportunity, academic freedom, limited government and the self-responsibility of free men and women associating to achieve their purposes in private, voluntary ways.

In particular, Hillsdale can submit for your consideration the sobering lessons of its nine-year ordeal of litigation and bureaucratic harassment under a tortured interpretation of Title IX -- an ordeal that could be re-enacted thousands of times throughout our society if this bill becomes law.

I might add that my personal experience with the subject under consideration today also includes having served since 1982 as Chairman of the National Council on Educational Research, a policy-setting body within the U.S. Department of Education, and having authored several books in this field. Education In America (1971) analyzed the current state of teaching and learning in this country and anticipated many of the findings of the celebrated 1973 Presidential Commission Report, "A Nation at Risk." The Balancing Act: Quota Hiring in Higher Education (1974) explored the harm being done to free inquiry by reverse discrimination policies. America By The Throat: The Stranglehold of Federal Bureaucracy (1983) explored the dynamics of growing government power at the expense of the private sector and the individual.

S. 2568 has been impressively titled the "Civil Rights Act of 1984." This title certainly commands our most respectful attention. After all, it was exactly thirty years ago this month, a few hundred yards from this spot, that civil rights received an historic affirmation when the U.S. Supreme Court handed down its ruling in Brown vs. Board of Education.

The self-evident truth that all men are created equal, proclaimed by Jefferson and The Declaration of Independence and pushed forward significantly yet not conclusively by Lincoln in the Emancipation Proclamation, gained new meaning and force for Americans of all colors and both sexes in the 1954 Brown decision. The wake of federal, state, and local government power was decisively shifted in one stroke on that May morning -- shifted at long last away from the side of unjust, unequal treatment of persons according to irrelevant labels and categories, over to the just, right, and moral side of impartial treatment, individual merit, and equal opportunity for all.

The ensuing three decades have been a long road of implementation for the original color-blind principle of the Brown decision, of course. There have been other legislative and judicial milestones along the way -- many moments that we can be proud of as a nation. There have also been unfortunately a number of wrong turns in the road, moments of losing the clear principle and slipping back to the old injustice under new disguises. There have even been moments when the very principle of equal rights for all has been violated, turned completely upside down, in the name of equality itself. As patriotism and the flag can sometimes become the refuge of scoundrels, so the rhetoric of civil rights is sometimes appropriated by the power hungry and the seekers of special privilege through government intervention on their behalf. All of us who cherish the genuine article called civil rights and equal treatment bear the obligation of vigilance against such counterfeits as these, counterfeits which both dishonor the concept of equality and visit very real harm upon individuals in our society as well as upon the institutions which helped provide structure and meaning in the lives of individuals.

Mr. Chairman, after careful study of the proposed legislation, I would have to say with sadness that to call this bill the "Civil Rights Act of 1984" reflects no truth in labelling.

The bill would enforce not civil rights, but civil wrongs.

Those wrongs would be perpetrated upon institutions both large and small, both public and private, throughout our society. Schools and colleges, hospitals and clinics, agencies of state and local government, large corporations and the corner grocery store, all would be subjected to vague anti-discrimination fishing expeditions by federal enforcement officials operating in a climate of perpetual suspicion and often without clear jurisdictional boundary even between one federal enforcement office and the next.

The financial, administrative, and psychological cost of doing business and delivering necessary services would be significantly increased for all the entities I have named. In the end, the burdens, the penalties, and the inconvenience would rest most heavily on the individual citizens who look to these entities for services -- and as usual, the citizens who are the most disadvantaged would feel the effects most sharply. More often than not, these would be members of racial minorities, or women, or handicapped people, or the elderly -- the very persons this bill purports to protect.

And for what? To insure that no one is discriminated against, that no one is treated unfairly. The goal is a noble one, but there are already ample statutes, enforcement powers and court rulings on the books, to see the goal progressively better realized. There comes a point at which granting ever broader enforcement powers to government and imposing ever more stringent reporting and compliance requirements on our public and private institutions, begins to become counter-productive. That point has been reached with the bill presently under consideration.

As Professor Harvey Mansfield of Harvard recently put it, many affirmative action programs and other anti-discrimination activities of government have become in the 1980s, attempts to kick down a door that is already open. That kind of kicking, blindly continued in response to interest group pressures or rhetorical abstractions rather than in proportion to genuine need, is bound to hurt someone. In this case, I submit that it hurts both those who are in the process of passing through the open door of equal opportunity in our society and those officials already working in good faith to hold the door open, and in fact it may even hurt the very structure of the door itself.

That is, this blind pursuit of social perfection, this snowballing aggrandizement of federal power and proportionate subjugation of every other institution to such power, is beginning to weaken in a very real way, the pluralism, diversity, and broad-based institutional stability of American life, the stability and adaptability that have been the source of our marvelous openness and youthfulness as a society over the past two centuries.

The Supreme Court, ruling in the case Grove City College v. Bell this past February 28, acted with a measure of sensible recognition that the remedy for actual or potential discrimination must be proportionate to the harm such discrimination might do. Specifically, the court ruled that the monitoring of non-discriminatory conduct by a college or university under Title IX is program specific -- that it does not extend throughout an entire institution by virtue of grants to one particular department or activity within the institution.

Now, in an election year rush to set aside this sensible ruling, the present legislation has been drafted in breathtakingly broad terms -- whether by design or carelessness I have no idea -- but nonetheless with the very real effect of sweeping away the program specific limitation, not only within education, but also in all of the other areas and institutions I mentioned a moment ago.

Taking stock of the federal bureaucratic aggrandizement certain to flow from enactment of the bill in its present form, and of the corresponding congestion and demoralization within many other institutions thus subjected to the heavy hand of bureaucratic monitoring, we can safely say that the cure being proposed here is far worse than the disease which the sponsors of the bill have diagnosed -- if in fact the diagnosis itself is even correct.

And I must personally disagree with that diagnosis as well, Mr. Chairman. Judging by the yardstick of limited government as laid down in the Declaration of Independence and the Constitution of the United States, judging by any measure of a healthy balance between the public and private sectors in a free society, I believe we must conclude that legislative action in response to the Grove City decision ought to be just the opposite of what the present bill envisions.

The concept of program specificity is reasonable and sound. The Congress should if anything reaffirm it with legislation, not supercede it.

It is the other half of the Grove City decision, much less noted in the press and here on Capitol Hill, which urgently needs to be overturned. I refer to the unanimous holding of the court to the effect that something called "indirect aid" to a college or university (and hereafter, should the present bill pass, to countless other institutions as well) occurs whenever an institution accepts from one of its students, customers, or clients, a dollar which that private individual received from some federal assistance program. This "indirect aid," the court ruled, subjects the recipient institution to federal control every bit as much as the institution's own direct acceptance of federal funds would do. I believe that it is difficult to overstate how pernicious and how widespread would be the effects of allowing such a doctrine to stand as the law of the land, let alone extending that doctrine through the present bill to cover vast new areas of activity which were previously understood as private.

One of the great sources of strength for America has been our status as an open society. Within that society the individual has been free to provide for himself and his family, to compete with others, or to combine with them in private voluntary associations. We have been free to support those professions, businesses, schools, hospitals or churches which best met our individual needs and preferences. In other words, we have prospered with competition and voluntary association, with the private sector in all its diversity.

We have done this in America, not through any commitment to an abstract ideology, but because we found it to be a system which works well. In the words of George Santayana, "The American people have made a philosophy out of not having a philosophy." We have found that the system works not only in the production of wealth, but also in the redistribution of wealth into all those channels of society where people felt it would yield the greatest results. We have proven that when men have the right to form those private, voluntary arrangements which solve their problems and meet their needs, both they and society will prosper.

The system has worked beautifully beyond the wildest dreams of the most utopian social planner. But it has worked precisely because we have allowed these voluntary associations the right to compete, the right to be different and the right to be uniquely themselves. When competing services are available, people have a choice and every choice extends freedom a little further. Competition and voluntary association change freedom from an empty battle cry into a vital part of everyday life.

Such freedom gives people the opportunity to make decisions on the basis of their own needs and preferences. And those decisions are not merely an additional freedom -- they are freedom itself. When we have real control over our lives and preferences -- over how we earn a living, worship our God, educate our children -- real freedom is present. In the absence of such choices, words like freedom become meaningless abstractions.

Competition and voluntary association, sometimes called the private sector here in American society, have done more to provide the essential mechanism of freedom than any other single element in our national make-up. We Americans have made freedom work. Those most progressive occasions in American society, in the best sense of the word, have been those occasions when our society was most truly free. And it is the private sector which has made this possible. Sweeping away all distinctions between the private and public sectors threatens that political, economic, and social success.

Not too many years ago Hillsdale was assured by government planners and by many educators throughout the nation that government subsidy of education would not bring government control. How distant and dated such assurances seem now. Those institutions which have chosen to sup at the government table now find that they are subject to a great and growing mass of bureaucratic control. National social engineering projects on the part of the public sector are replacing private standards with public standards concerning what teachers are to be hired, what students are to be admitted and what is to be taught in the classroom. Political pressures are rapidly replacing private standards as the arbiter for most educational decisions undertaken today.

Limited government is the very cornerstone of our American system. Limited government means that most of the institutions and most of the decisions in a society remain private and voluntary, not public and coercive. The "indirect aid" formula advanced under Title IX and affirmed by the Supreme Court in Grove City v. Bell, effectively holding that every dollar which had ever passed through federal hands continues to carry federal control with it wherever it is spent thereafter, makes a mockery of the limited government idea. It goes far toward erasing any meaningful distinction between what is public and what is private in the United States any more.

That the Supreme Court should have upheld this doctrine without a single dissenting vote is disturbing evidence of how lightly the principles of the Declaration of Independence are regarded today, even by the constitutional bodies most sternly charged with their guardianship.

That both Houses of Congress are now moving with ill-considered haste to take up legislation for extending the "indirect aid" doctrine beyond education into every area of American life, is certainly more depressing still.

Let me turn now, Mr. Chairman, to Hillsdale College's experience over the past decade, under the impact of precisely the kind of legislation which the present bill would vastly extend.

Hillsdale College has for 140 years shunned both government assistance and government control in order to fulfill its founders' purpose of offering a liberal arts education untainted by the restrictions on free inquiry which inevitably accompany reliance on government support.

Founded by Free Will Baptist abolitionists in 1844, Hillsdale has always had a vigorously open admissions and employment policy. The first woman in Michigan, and the second anywhere in the United States, to receive a Bachelor of Arts degree was an 1852 Hillsdale graduate. Blacks were also among Hillsdale's first graduates, nearly a century before it came to Washington's attention to press for open admissions.

Yet despite this record of absolute independence from government funding of any kind, and despite this exemplary record of non-discriminatio and equal opportunity -- a record never challenged by the government or anyone else -- Hillsdale has found itself since 1975 defined as an institution receiving federal aid, through the farfetched semantic definition I eluded to a moment ago. Hillsdale's alleged status as an institution receiving federal aid is based on our enrolling students who receive federal grants and loans as individuals, and then elect to apply those funds toward their tuition at Hillsdale. When this pretext for the extension of government control over our affairs as a private college was first put forward nearly a decade ago, the Hillsdale College Board of Trustees formally resolved to resist the intrusion by all means available to us. Hillsdale was the original litigant in what subsequently came to be called the case of Grove City College v. Bell. As mentioned earlier in my testimony, the Title IX "indirect aid" pretext for government intervention in the affairs of Grove City College and Hillsdale College was finally upheld by the U. S. Supreme Court earlier this year.

That ruling appears to present Hillsdale with a stark choice. We can either sign a compliance form acknowledging we are subject to federal control -- in effect, a blank search warrant authorizing widespread bureaucratic intrusion into our records and decision-making processes, an obligation for Hillsdale to be considered guilty until proven innocent, even in the absence of any allegations against us. Or we may have to disengage from the National Defense Student Loans, Basic Educational Opportunity Grants, and other student assistance programs in question, at significant potential hardship to hundreds of our students and major financial jeopardy for the college. We estimate that as many as 300 of Hillsdale's 1000 students might be affected by such a disengagement from student aid programs, at a total cost approaching $1 million per year.

Yet Hillsdale College's response, voted unanimously by our Board of Trustees on May 11, 1984, remains consistent with our stand for principle since 1844. We shall stand on our refusal to sign the compliance forms when and if they are next presented to us. And if such a refusal makes it necessary, we shall cease accepting, from any student, tuition dollars with federal strings attached. We shall endeavor to make available, to any student thereby deprived of federal aid, equivalent funds from private sector sources.

The Supreme Court's interpretation of Title IX as justifying federal control over any institution where individual aid recipients spend their funds, is an Alice-in-Wonderland attempt to police discrimination where no discrimination has been alleged. All of the dislocations, burdens, injustices, and hardships which I hypothetically described in reference to the likely effects of the bill you are considering, are now on Hillsdale College's doorstep as imminent realities. Yet the fact remains that Hillsdale has been extending equal opportunity to women and blacks since well before the Civil War, and that its record in this regard has never been disputed by the government. Ironically and tragically, by forcing Hillsdale to warn its students away from accepting federal tuition aid, as the price of preserving our independence from government control, the Grove City ruling -- and still more so the proposed legislation -- threaten to narrow the very conditions of equal educational opportunity they purport to defend.

Speaking again simply for the one small institution I am associated with, Mr. Chairman, I can state that Hillsdale is determined that neither the Court ruling nor the proposed legislation will actually have such a discriminatory effect in our own case. We are committed to replacing any lost federal dollars with equivalent private resources made available by fair-minded individuals throughout this country who have come forward to stand with us in increasing numbers since this case began nine years ago.

The legislation before this Subcommittee may pass, or it may fail of passage. Based on the election year mood that seems to prevail, I am not sanguine that the legislation will be rejected. Nevertheless, we at Hillsdale hope to make it clear by our example that there is another path Americans can take. The principle of private independence from public intervention, though severely set back in Congress and the courts, can still find ultimate defense in the marketplace. This is the defense to which Hillsdale College will turn if our next round of rejection of the Title IX compliance forms makes it necessary. We shall set out to make enrollment at Hillsdale accessible to students of every economic background with the sole support of dollars honestly earned in the free economy and voluntarily donated to this private institution, dollars that have never had to be taxed away by the government middleman and then redistributed through tuition aid programs with strings attached. The Supreme Court and Congress seem to be saying, wrongly but unequivocally, that wherever federal dollars can remotely be construed to go, federal control will now go with them. There remains no benefit of the doubt for private institutions, no grey area. Hillsdale will therefore have no choice but to step decisively out of that former grey area and affirm its total reliance on those private sector resources from which America's strength has always grown.

If the proposed legislation passes, this will be the only recourse for many other formerly private institutions which wish to preserve their independence. Unfortunately, countless other institutions will find themselves too heavily entangled already with federal assistance to disengage totally as we propose to do. It is especially for the protection of such institutions caught in the middle that the hasty over-reaction embodied in the proposed bill must be rejected by the Congress, if clearer heads can prevail.

Ultimately the question comes down to our asking "What sort of society do we want?" If we have no objection to a directed and regulated society, then there will be no objection to the bureaucracy operating in the way it does, often making its decisions administratively rather than by public consent in elective chambers. There can be no objection to it using its powers to discriminate against all alternative philosophies and all alternative ideas of service if what we want is a regulated and directed society. Nor can we object to seeing bureaucrats as those who make the decisions, defining what constitutes an adequate education, or appropriate health care. We cannot complain about these things if what we want is a regulated and directed society. And no protest can be made when we see every passing craze and unbalanced ideology foisted into our service institutions in the name of "progress." I repeat: No complaint can be made if what we want is the directed and regulated society.

If, on the other hand, we seek a society in which men and women make their own decisions, and have the right to choose institutions and services which are compatible with their own deeply-held convictions, then we must sharply limit the power of the governmental regulatory agencies, putting that power back in the hands of the American people.

Do the American people wish to lead their own lives and make their own decisions, or do we want a Washington bureaucracy to control our lives and make our decisions for us?

I believe the answer to that question is self-evident. Accordingly Hillsdale will continue to contest the extension of arbitrary and capricious bureaucratic interference with the private affairs of individuals who freely choose to attend our college and with the legitimate sphere of decision-making of the college itself. By the same principle, I urge in the strongest terms that this Subcommittee act unfavorably on the misconceived, mis-named, and dangerous legislation now before them.

I thank the Chairman and the members for this opportunity to present my views and those of Hillsdale College. I will welcome your questions on any portion of my testimony.

Senator HATCH. Thank you, Dr. Roche. We appreciate the testimony of all three of you.

Let me just begin by asking each of you this: What are the policies of each of your institutions with regard to the admission of racial minorities and women? Let us start with you, Dr. Roche, and we will go across to Dr. MacKenzie.

Mr. ROCHE. We were told by the 1964 Civil Rights Act that it was illegal to gather information on the racial and sexual composition of our staff and student body, and have scrupulously avoided doing so. We hire faculty and admit students entirely irrespective of race or sex.

Senator HATCH. Dr. Hafen.

Mr. HAFEN. That is also true at our school.

Mr. MACKENZIE. That is true at Grove City College, and we also publish that in all of our literature.

Senator HATCH. Have any of your institutions ever been accused of discriminatory conduct against women, or minorities?

Mr. MACKENZIE. No, sir.

Mr. HAFEN. No.

Mr. ROCHE. In almost 10 years of litigation with the Federal Government where the issue was title IX, the question of discrimination has never once been alleged.

Senator HATCH. If each of your institutions abides by a policy of nondiscrimination toward "protected categories" of individuals, what precisely is it that concerns you most about the title IX coverage? Is it simply a matter of having to file a few Federal forms from time to time? Do the objectives of title IX not clearly outweigh the relatively minor inconvenience of filing Federal forms, or is it more?

Mr. ROCHE. Of course, the question is not simply the filing of forms, although the burden is substantial and onerous, and the same money, time and attention might be devoted to books to the library or scholarships for additional students. But far more important than the administrative difficulties is the assumption that once recipient status and Federal control have been accepted on our campus, we feel that the camel's nose under the tent may not stop at that point. Once the premise is accepted, then the questions of who is admitted as a student, who is hired as a professor, what we are teaching in the classroom, or indeed anything else in the institution, becomes subject to Federal control.

Senator HATCH. Dr. Hafen.

Mr. HAFEN. The issue is whether a college, a private institution should be subject to Federal jurisdiction which, in the case of title IX, brings with it what I would have to characterize as a monolithic philosophy about education. That is what I was alluding to in my earlier statement. It is elaborated further in the written statement. There is a tendency to homogenize all of the education in the United States through a lot of other forces anyway.

Senator HATCH. Have it directed out of Washington. Is that what you are saying?

Mr. HAFEN. Yes. And Washington is contributing to that enormously. I suppose if we want to have all education be the same way, then that is the issue. And, of course, what I was speaking to earlier is the value of diversity and pluralism so that students and families have a choice of attending different kinds of institutions—not where there may or may not be discrimination, but choosing among institutions where there is no discrimination on the basis of race or sex in ways that harm or hold people back. But if we push that too far, we eliminate the freedom of these institutions to offer different educational alternatives.

Senator HATCH. Dr. MacKenzie.

Mr. MACKENZIE. I would concur and I would particularly underscore Dr. Hafen's remarks about the value orientation. We are unwilling to give over jurisdiction because we treasure the value orientation on the part of Grove City College for over 100 years. We have already received notification, for instance, back in 1976 that under the impetus of 1202 Commission legislation, the Commonwealth of Pennsylvania advised us that we had to secure from Government authorities permission to make changes in our degree programs. And I would suggest to you, Senator, that when the Government begins to raise questions about a private school that takes no Government funding about its curricular programs, its degree programs, then the time has come to be alarmed.

I would also add that we would refuse to sign such compliance forms not only because we treasure that value program, but also we are convinced that it would significantly add to the cost of education for a student at Grove City College. Presently, a student, for room, board, and tuition for a full year, is paying under $5,000. We are convinced that if we had to jump through all the Federal hoops which would be laid upon us once we signed compliance forms and accept jurisdiction, that the cost of education would go up dramatically as inefficiency would be increased.

Senator HATCH. Let me ask each of you a philosophical question.

Assume that your institutions receive no direct Federal aid or assistance. Indeed, assume that they do not even receive any indirect assistance for the purpose of this question. What is wrong with the notion that Federal policies of nondiscrimination ought to apply? Are there not some public policies which in the long term or the long-term scheme of things, nondiscrimination for example, that ought to apply to even genuinely private institutions?

What is wrong with that? Let us start with you and then Dr. MacKenzie and then Dr. Roche.

Mr. HAFEN. I suppose the question is whether the Federal Government should simply pass a law saying that no man, woman, or child in this country should discriminate against any other man, woman, or child, and get it over with. There must be reasons why we have not done that. Those reasons have to do with the choice we made a long time ago, and the choice we tried to sustain over the years collectively as a society, to protect diverse institutions, to protect the private sector, to maintain a system of limited government.

This country was born of an experience of the travail that comes when Government is unlimited. That is what the Declaration of Independence was all about. And while that may sound like theoretical abstractions with a bill like this, we are approaching the day when we will see firsthand what it means, that even in the name of worthwhile causes, if the private sector is extinguished, then we have paid too high a price because the preservation of the private sector for a variety of reasons is itself a very noble cause that has to be weighed in the balance as an interest that is at stake in a proceeding such as this.

Senator HATCH. Dr. MacKenzie.

Mr. MACKENZIE. At Grove City, we certainly would support nondiscrimination as the law of the land and as national policy. I think our only concern and our plea is that somehow ways be found to balance the elimination of discrimination, to balance that with the preservation of legitimate constitutional freedoms in this country.

Senator HATCH. I see.

Dr. Roche.

Mr. ROCHE. The original ideal of the private sector and, indeed, the public sector in our social order has centered around the symbolism of the blindfolded Goddess of Justice. All who came before her received equal treatment irrespective of their race or sex.

We are now told, that the blindfolded Goddess of Justice should peek, find out who we are, and then, on the basis of our race or sex, treat us in differing ways. I find that ultimately discriminatory in and of itself and a direct contradiction of what this society, the private sector, and the pluralism and diversity of our society formerly provided.

Senator HATCH. Well, I have appreciated the statements that each of you have made on this question.

I think there is a need to maintain a healthy and viable private sector and not to subordinate its diversity and variety through stultifying conformity of Federal regulations and Federal public policy. I think there is a need to maintain refuges within society where people acting without harm to others can be free of the overweaning presence of the Federal Government and can chart out their own policies and their own destinies. The existence of a healthy private sector is a check, a limitation, if you will, upon governmental power. That is the way our founders in this country wanted it, that is the way it ought to be.

You each have spoken eloquently with regard to this question.

Dr. Hafen, I wonder if you could tell me more about the type of educational institution that belongs to the Association of Independent Colleges and Universities? How typical, for instance, of these institutions are the sorts of problems which you and your colleagues on this panel have alluded to or addressed today?

Mr. HAFEN. There is a good deal of diversity in our association. As I indicated at the beginning of my statement, I am not sure that everyone in the association would agree with everything that I said earlier. But in general these institutions are characterized by a commitment to the basic principles we have talked about. It was really for those reasons that this organization came together back in 1968, and was founded under the leadership of people who then were predicting that if colleges and universities accept larger amounts of Federal aid, they would have to yield significant portions of their academic autonomy, that the educational enterprise that they were free to design and manage as they wished to the interest of students who choose whatever they had decided—that all that would be jeopardized. And I suppose that the founders of AAPICU, were they here today, would be saying we were afraid we would come to the point where we are today. That was one of the reasons that these schools resisted Federal aid, even at a time when it did not appear that Federal aid would bring strings. Many of the strings came after the Federal aid, and our schools have resisted on principle.

Senator HATCH. Specifically funding, title IX funding?

Mr. ROCHE. The fundamental question for Hillsdale and for everything that I believe we have been addressing this morning is the question of indirect aid. It is that indirect provision which causes such an enormous extension of the public sector into the private, not simply at Hillsdale, but throughout our society as a whole.

Senator HATCH. How do you feel about that, Dr. MacKenzie?

Mr. MACKENZIE. Very definitely I would concur and I would be deeply troubled to think that that definition of recipient or the indirect aid concept could be extended basically to all sectors of our society. To me it is a very dangerous principle.

Senator HATCH. Do any of you feel that this type of legislation would have a serious impact upon your donor base?

Dr. MacKenzie

Mr. MACKENZIE. I definitely feel that our support could decline to some degree. We have a very committed constituency and, at the same time, there are some, I am convinced, that would defer gifts if Grove City College could not maintain its distinctiveness, its value orientation, its freedom emphasis, some of the traditional values that I think are in the school. It would no longer be Grove City, and we would lose support.

Senator HATCH. Dr. Hafen.

Mr. HAFEN. Essentially what we are talking about is making private colleges into quasi-public institutions. Their tuitions are already four to five times as high as public institutions, and if members of the public see no significant difference between the kind of education, the kind of atmosphere, they have no incentive at all to pay four or five times as much to attend.

Senator HATCH. Or to make donations?

Mr. HAFEN. Or to make donations. I mean support in general financially by sending students or contributing because it is the very distinctiveness of the institutions that has given them the only competitive advantage they have in competing for funds or students.

If I could, Senator, I wanted to mention something tacking on to a question that you asked just a moment ago. I have been puzzled that in the discussions that I have heard on this subject that people talk as if the idea of extending the "program specific" concept had not been considered before, as if that is some wonderful new idea.

As I have read through the legislative history of title VI, and a number of the other statutes under consideration, that issue was discussed at great length. And it surprises me that the concerns expressed then by the very sponsors of that legislation have not been brought to the public attention now. It was proposed then that recipients of welfare payments should, by the way they spend their money, bring their payees within Federal jurisdiction, and it was explicitly rejected after a great deal of deliberation. Also, the distinction between direct and indirect aid has been considered by the

Supreme Court in the parochial school cases. The distinction is a very important one.

So to say that you are talking about an important principle when you want to narrow the definition of "recipient" for jurisdictional purposes—then that is a strong argument. It is a very important argument and has been around a long time and in a lot of contexts.

Senator HATCH. Dr. Roche.

Mr. ROCHE. I share the concerns expressed by both my colleagues. The central fact of legislation like this is that it reaches further and further into the vitality, diversity, and uniquely separate characteristics of a freely working social order, and certainly that would impact Hillsdale as it impacts these other institutions.

Joseph Schumpeter put it very well half a century ago, and this legislation was tailormade to his one sentence description: the conquest of the private sector by the public sector. We will all be losers as the result.

Senator HATCH. How would you contrast the attitude of your institution with larger institutions, larger private institutions, such as Ivy League schools, for example? Do you think we can expect to hear the same fears and concerns from these particular schools in comparison to the fears and concerns that you have raised with us today?

Shall we start with you, Dr. MacKenzie?

Mr. MACKENZIE. I think there is a distinction between those of us who represent the smaller schools and the larger Ivy League, for instance.

I think as one university president told me that he would like very much to follow the path that Grove City has gone, but that he is unable to because one-third of his budget is already coming from Federal sources. He has become dependent on Federal funds.

Therefore I think that the song that you would hear from some of the larger university presidents probably would be significantly different because they are dependent upon the Government trough.

Mr. HAFEN. I generally agree with that. I would add to it a comment made to me recently by a person who works closely with a prestigious national association of colleges and universities, most of which are public. He said to me, a few years ago, people like the presidents of Yale and Harvard were speaking out as vocally as we are about the onerous burden of compliance with Federal regulations in areas of the academic enterprise that seemed to them to violate very fundamental principles. And he wryly smiled and said I think some of them are not realizing that the enforcement has not been as onerous in recent years as it might have been. And under this new legislation, it would be far more than it has ever been. And if they really understood that, I think we would be hearing from far more of them because intrusions on academic freedom are a matter of principle with them, even if they are dependent on Federal money.

Mr. ROCHE. When Federal aid to education was first begun in comparatively recent years, the argument advanced at the time was that Federal aid would never bring with it Federal control. Some of the same people who were saying that are still on hand at those institutions where Federal control has now arrived. Behind the scenes, there has been a terrific amount of complaint about the process. One-half the budget of Columbia University or Stanford University in fact is Federal money. Obviously, Federal control has now come with that money.

But, as President MacKenzie said a few minutes ago, once people are sufficiently deeply embedded in the process to such large proportions of their budget, you must expect that they finally have no choice except public acquiescence. So the best bastion of privacy and diversity left in American education is the comparatively small, independent private school.

Senator HATCH. The focus of title IX has frequently been upon the issue of athletic competition and equality of programs in athletics and interscholastic competition.

In your opinions, what would be the impact of the *Grove City* case in this area?

Given so little in the way of Federal assistance, which goes to college and university athletic programs directly, would we not be dooming recent initiatives and equal athletic opportunity for women if we did not enact this legislation? This is a concern that some very sincere people who have supported this legislation have. Because they feel that under title IX, under a more expansive view of title IX, opportunities in women athletics have actually increased.

Dr. Hafen.

Mr. HAFEN. I would like to comment on that, Senator Hatch, because it gives me a chance to brag a little bit about something at Ricks College that happened earlier this month. Even though we have not believed that we were subject to title IX in the sense that is being contemplated, we have vigorously pursued academic and athletic activities for women. And I was very pleased to see the news the other day that our women's track team took second place in the National Track Meet sponsored by the National Junior College Athletic Association for all public and private two-year schools in the country. That is an indication, I hope, of the quality of what happens in athletics through our commitment to women.

Senator HATCH. And you do not think that you need this bill in order to continue to provide equality in athletics for women?

Mr. HAFEN. We are committed to it without the bill needing to prod us.

Senator HATCH. What about other institutions within your organization? Do they have that same feeling of commitment?

Mr. HAFEN. It is hard for me to speak for them, but my impression from all of my associations is that these are not people who have a view about women that would be discriminatory. On the contrary, there is a tremendous commitment to educational opportunities for women, and that includes athletic opportunities, employment opportunities. There is a great interest in helping women to prepare for professional schools and the kind of freedom that encourages that response is very heartening to see. That is the impression I have about their general philosophy. We do not have here the kind of problem that exists in some contexts where in fact people do want to discriminate in some way. And if they were not prodded, they would discriminate. I just do not think that is what we are talking about here.

Senator HATCH. Thank you.

Do you feel the same way?

Mr. ROCHE. I can certainly speak as one of the members of Dr. Hafen's association, and at Hillsdale we are proud of the fact that during the last decade when we have not felt controlled by title IX, we have pioneered in substantial expansion of women's sports.

Our commitment to expanded financial aid for women, in terms of coaches, in terms of programs, in terms of scholarships, has been roughly four times that devoted to the men because we feel we are engaged in new programs now coming online. But we are responding to the needs of our students, not pressures from the Federal Government.

Senator HATCH. Thank you.

Dr. MacKenzie.

Mr. MACKENZIE. Senator Hatch, as a matter of conscience, Grove City also has been expanding significantly over the years the women's program to the point that our women also, and I would like to brag, Bruce, our women also are winning conference championships. I should say this does not enhance the male ego on our campus. Some of our men feel very much chagrined at the successes of many of our women's teams, but we, along with others, and we are also members of AAPICU and support a very vigorous and active women's program.

Senator HATCH. I am thinking or at least considering the introduction of an amendment to S. 2568 at the appropriate time which would maintain the institution wide of the coverage of the bill but would exempt from title IX coverage those educational institutions which receive no direct Federal assistance from the Federal Government and receive indirect assistance only in the form of assistance going directly to the attending student, such as Pell grants, or veterans benefits.

What would be your attitude toward such an amendment?

Mr. ROCHE. Such an amendment would provide full protection of the antidiscriminatory provisions of the legislation but still also provide full protection of the privacy and diversity and pluralism of our American educational structure. I think such an amendment would be a profound improvement of the present bill as it now stands.

Mr. HAFEN. One of the things I like about what you just proposed, Senator, is that the amendment would come from a careful drafting of the term "recipient" without touching the program specific concept. I think it would be important to the Congress if they are going to enact something about program specific that there not be exceptions.

Your proposal would provide there is no exception because what you have done is handle this in the way the recipient is defined rather than by trying to exempt some program or activity.

Mr. MACKENZIE. We would feel the need to study it further and study the implications of it, but at first blush we believe we could support it enthusiastically.

Senator HATCH. Well, I am not sure what to do. When title IX first came out, I was influenced by a number of women in my own State and people all over the country who thought it was just awful the way they were initially interpreting it. On the other hand, as time went on, I had a number of these very same women, in addition to other women advisers in Utah, come to me and say they felt that title IX had done a great deal of good for women in America. As I looked into it, I too, came to the conclusion that it had. So I withdrew the initial bill that I had filed.

I want to express my appreciation to you as chairman of this committee for taking time to be with us today; I think that you have added a great deal to our general knowledge about this issue. I just want to thank each of you for being here; we respect each of you and know that you do have reputations throughout the educational community for equal treatment and decency. Let us hope that we can resolve this issue so that there is no discrimination in any of our schools in this country, private or public. But so that, on the other hand, we do not create a monolithic structure where every aspect of education is dictated from Washington, D.C. I just do not feel that this is the fount of all wisdom here. And I take it from your statements here today that you are sure that it is not the fount of all wisdom.

So, with that, we want to thank each of you for appearing and we appreciate the time that you have given to us today. Thank you for being with us.

Our next two witnesses will also appear as a panel. They are two extremely distinguished members of the academic community. They are Prof. Charles Fried of the Harvard Law School, and Prof. Jeremy Rabkin, professor of government at Cornell University.

I feel particularly pleased to welcome both of you here today. You both have excellent reputations. You certainly will add a lot to our hearings this day.

If we can, we will begin with you, Professor Rabkin, and then I will turn to Professor Fried. We welcome you both to the committee.

We are running a little short on time. I hate to try to abbreviate it, but I do have some questions. I would like to ask you both to be as concise as possible because it may be very important to have the answers on the record.

STATEMENTS OF PANEL CONSISTING OF JEREMY A. RABKIN, ASSISTANT PROFESSOR OF GOVERNMENT, CORNELL UNIVERSITY; AND CHARLES FRIED, PROFESSOR, HARVARD UNIVERSITY LAW SCHOOL

Mr. RABKIN. Yes, in the interest of brevity as well as in the interest of avoiding repetition, I will not read my prepared statement here but just highlight some of the main points.

Senator HATCH. We will put both prepared statements in the record as though fully delivered.

Mr. RABKIN. Thank you.

Let me say that I am very disturbed by this bill and, in some respects, I am even appalled by this bill. There are a lot of assurances by the sponsors of the bill and by various civil rights advocates who seem to have played a role in drafting it. They give us a lot of assurances that the bill will really have only modest and limited effects.

One thing I would like to point out at the outset is that——

Senator HATCH. Well, I agree with you. I do not know how anybody can make that argument.

Mr. RABKIN. Right. And in particular I want to say that assurances like that from civil rights advocacy groups do not deserve very much credibility and, indeed, I think assurances like that in the legislative history of civil rights statutes or civil rights regulations at this point should have very little credibility. I think the whole history of civil rights legislation and civil rights regulation in this country has been characterized by the proponents of new measures scoffing at critics who suggest there may be this or that problem. The proponents insist that, "Oh, no, there will not be busing, there will not be quotas, there will not be some arbitrary requirement of racial balance." And lo and behold, it turns out afterward that all of these things come to pass and the proponents are quite shameless about just forgetting their initial assurances. So I would not take seriously anything that is said on behalf of this bill, anything to suggest that actually it is a rather modest and limited measure.

Second, I am rather exasperated by the claim that is made by proponents that the *Grove City College* decision by the Supreme Court has suddenly emasculated a traditional approach to enforcement that has been very well established and not only well established but absolutely crucial to enforcement of these various civil rights statutes. That is not true and, indeed, if you stop to think about it, it seems to me, on the face of it, it is rather incredible. The regulations implementing title IX have been in force for almost nine years. The regulations implementing title VI have been in force for almost 20 years now. If the Supreme Court's interpretation insisting on the program specific approach, if that were really such a radical departure from the way in which the Office for Civil Rights and other enforcement agencies had been proceeding, you really have to wonder in 20 years or in 10 years, how is it that the agency was not brought up short previously? And there is I think a simple answer to that.

One part of the answer is that the regulations actually did not have quite the sweep that this bill would now provide and, second, although it is true that the regulations adopted by enforcing agencies often did have, at least by implication, a rather broad scope, the enforcing agencies very rarely tried to test the full reach of this. The enforcement agencies themselves, I think, were aware that there was certain ambiguity about how far they could go and they did not press the point too far.

Now, the current bill is saying sweep away all ambiguity and all the possible limitations and go for broke. That really seems to me a very bad idea.

For one thing, it seems to me, as various witnesses have said before, that the current bill would put all funding at risk by replacing the pinpoint provision in the existing statutes with a provision allowing termination of funding that "supports discrimination."

Now, if the bill does not regard any aid to a recipient as "supporting discrimination," then I do not see what this bill has achieved. Because if that is the view that you take—that it does not necessarily mean that because a recipient is receiving Federal funds, that those funds are "supporting discrimination," then you are putting the enforcing agency back into the problem of untangling the connection between Federal funds and some alleged discrimination elsewhere in the institution. And that is the very problem which people say the *Grove City* case thrust on the enforcing agency and the very problem which this bill is supposed to correct.

It seems to me that the likelihood is that you will really expand the scope or the extent of the defunding sanction.

I might add I do not think that is even going to be very helpful to the enforcing agencies. I think the Office for Civil Rights, its experience over the last 20 years, suggests that the larger the scale of the funding which the Government tries to terminate to enforce civil rights measures, the more immediate political pressure there is on the enforcing agency to reach a very quick and accommodating settlement which civil rights advocates always call a sellout. When you threaten to take away a vast amount of funding as, for example, HEW did in forcing desegregation requirements on the State higher education system in North Carolina, there is just a lot of commotion and it is very hard for the agency to do a very thorough or rigorous enforcement job.

In addition, it seems to me this bill, again as has been said, is likely to very much expand the jurisdiction of these various nondiscrimination requirements. I will not repeat what has been said about the trickle down and the trickle up theories. Let me just call attention to a clause which has not been discussed previously, that is the clause defining a recipient as not only the institution receiving Federal funds but any "successor, assignee, or transferee of any such entity or any such subunit."

This language, I think, is alarmingly open ended. In the implementing regulations for title IX, the term "recipient" is defined as "any entity which operates an education program or activity which receives or benefits from Federal financial assistance, including any subunits, successor, assignee or transferee thereof."

There, it seems to me, the reference to "successors, assignees or transferees" is to successors or assignees of the relevant education program. But with the new bill, you are plainly speaking about successors or assignees or transferees of the recipient institution as a whole. I really do not know what those terms mean in this context. It seems to me quite plausible to think that anybody who receives some kind of payment or some kind of benefit from an educational institution is a successor or assignee or transferee. Thus, if you think about, say, a private contractor who does paving work on university sidewalks, under the existing regulations, it is quite clear that this contractor cannot be considered a transferee of an education program. But I am not at all sure that this contractor would not be considered a transferee of the university per se.

Certainly it seems to me a private developer who buys old school buildings to turn them into commercial properties, and that is happening in a lot of parts of the country as school districts find that they just have too many buildings, certainly it seems to me that that private developer would be a successor or an assignee of the public school system selling the buildings. So it seems to me the developer would then be subject to title IX, and what will probably be much more distressing for the developer, he will find that he is also subject to section 504 which means that he has got to install wheelchair ramps, elevators and so on, and he has got to make sure that his work force makes every accommodation possible to employ as many handicapped workers as possible. He is going to find that he has one tremendous headache because he has made the mistake of buying some buildings from a school district that was covered by these regulations.

I think one thing that you can anticipate is that you will have a lot of people running into Congress screaming about all of these unanticipated side effects and, conversely, you will have a lot of attorneys advising a lot of people, "Do not get involved with anybody who has any connection with Federal funding."

Senator HATCH. We are anticipating them. That is one reason that you are testifying.

Mr. RABKIN. Excuse me?

Senator HATCH. We are anticipating some of these side effects

Mr. RABKIN. Yes, I hope so. I mean let me say I am very glad that this subcommittee is. It does not seem to me from the debates in the Senate chamber that anybody else has been seriously anticipating them.

So it seems to me you are going to have a lot of problems down the road. I just would remind you that in title IX now, there is a whole series of what seems to me rather amusingly picayune amendments to the general prohibition on sex discrimination, such as the exception for father-son or mother-daughter school activities, or the one for scholarship awards from beauty pageants. And each of these represents a panicky congressional second thought to the careless sweep of the original provision. You know, Congress said: "Fine, no sex discrimination," and they really did not think at all what it would mean. Later on, people came running in and Congress had to make all of these changes.

I think you are going to find that in the future it is going to be quite embarrassing; I do not think it is actually going to be good for civil rights groups. I think it will cast them in a very bad light as all of these examples of pettiness in the regulations come into publicity. It seems to me that this would be a good time for Congress to do its thinking in advance and not make panicky corrections later on.

Let me mention one other thing about the problem with a direct institutionwide coverage in these statutes. I said at the outset that, so far as I could see, the Office for Civil Rights which enforces title IX, of course the dominant enforcement agency for title IX, they really had not had much trouble with most colleges in reaching any kind of sex discrimination that they wanted to reach. They were able to show that in some way there was some indirect connection between Federal funding and the problem they wanted to reach. But there was some ambiguity. They could at least back off, there was some excuse for saying, "Well, some things are perhaps not covered by the regulations."

Quite apart from what I mentioned about the assignees and transferees, quite apart from lots of other remote problems, if you just stop to think about the immediate implications of this, it seems to me there are some really disturbing problems.

The current version of title IX has an exemption for an educational institution—I am quoting now—an "educational institution which is controlled by a religious organization" if the general prohibition on sex discrimination "would not be consistent with the religious tenets of such organization." Now that says if you are not controlled by a religious organization, title IX applies to you in full. So say that you are a quite secular institution, but like many colleges you want to make some provision for the religious needs of your students so you have some accommodation, for example, you allow religious groups to use buildings on the campus for various kinds of religious services. That is a very modest accommodation to religion, it seems to me. It seems to me the institutionwide approach suggests that, for example, Orthodox Jewish services in which there is separate seating maintained for men and women, or a Catholic mass in which you know the Catholic priest is always a man, if these things take place on the campus, someone is perfectly entitled to come forward and say these are in violation of title IX, and title IX applies to the whole institution and every single aspect of its programs. And the exemption for a college that is controlled by religious organizations—that will not save you because—taking this example, you are a secular institution.

Now, that is again a very embarrassing awkward problem. I do not expect that the Office for Civil Rights will ever be foolish enough to press this point on its own, but it is quite possible that someone would raise it in private litigation. And I remind you title IX, like the other statutes, has been held to afford a private right of action. And we do have professional antireligious litigators who like to raise these issues as a matter of principle.

Similarly, I could envision lots of difficulties with ROTC units on various campuses. The armed services have made great efforts to integrate themselves in terms of involving women in their activities, but I am sure there are still certain kinds of distinctions maintained between men and women in these ROTC units. And I would hate to see campuses dragged into litigation over that because title IX has just been thoughtlessly applied to the entire institution.

Well, there seems to me then so many possible difficulties from this sort of careless application to the entire institution, not to say its assignees, transferees and whoever else on the outside is indirectly connected. It seems to me there are so many problems, you really have to ask yourself, why do the civil rights groups insist on it—why do they insist on this principle that even one little touch of Federal money means that your whole institution comes under the Federal Government's regulatory control? That I think is a very good question. Why do they insist on that?

But it seems to me they are very—I mean this is not an explanation, but I am simply restating their position—they are very attached to the abstract notion that any aid to any part of an institution does mean that somehow the taxpayers are supporting discrimination.

Let me, in concluding, point out that that principle seems to me to have very, very ominous implications outside the civil rights area. In *Katzenbach* v. *Morgan*, the Supreme Court suggested that Congress may have an independent authority to expand the substantive reach of the 14th amendment. Now, taken together, the provisions in this bill, as I have said, seem to set down the principle and they seem to be a congressional precedent for the principle that Congress regards an institution as somehow subject to Federal norms in its entirety if it has any little portion of Federal funding. This seems to me could very well justify the inference that any aid to a religious institution should be viewed as unconstitutional Government aid to religion. Perhaps it is alarmist to fear that this congressional precedent would encourage the Supreme Court to impose further restrictions on Government aid to religious institutions, but I remind you that the Supreme Court has already gone a lot further in this direction than many constitutional scholars thought was likely or appropriate, and I myself have reservations about giving the Court a further push in this direction. There are other areas where this possible constitutional precedent should give us pause.

During the 1970's, the Court went very far in imposing due process requirements in a wide range of novel circumstances. I do not find it inconceivable that the present bill, if enacted, might be urged on the Court as a precedent for extending due process requirements to private firms receiving Federal money. Because under the principle here, they are considered somehow an extension of the Federal Government or subject to the norms which apply to it.

I must say I am quite uneasy at the prospect of Chrysler or some future beneficiary of a Federal bailout being required to provide due process before firing any of its mid-level managers. You may say that is all speculation, and I would be the first to admit it is very hard to predict what the Supreme Court will do.

But my last point, and perhaps the most important one, is what this bill will mean as a political precedent. The Supreme Court Justices can do what they like, but think about the message this is sending to other groups campaigning for various changes in Federal policy.

Many feminist groups clamoring for this bill, insist that it is a matter of utmost urgency to ensure, for example, that women's teams be funded on an equal basis with men's teams in college athletic programs. They express outrage that as a possible consequence of the *Grove City* decision, Federal money may continue to flow to universities that do not maintain this precise balance of funding between male and female athletic programs.

Well, with all respect, I would point out that not everyone thinks this is the first priority, and lots of people's priorities are quite different. Many people believe that abortion is equivalent to murder. They find it outrageous that their tax dollar should be used to support this conduct.

Now, if the Civil Rights Act of 1984 is enacted, I do not see how the Senate can dismiss prolife advocates demanding that the Hyde amendment be expanded to forbid abortions in any hospital which receives patients with medicare or medicaid funding—which is almost all hospitals in the country, I believe.

Actual abortions at such hospitals, after all, are "supported" as much by this indirect funding as the hypothetical sex discrimination at Grove City College was "supported" by Federal grants to Grove City College's students. I think those people have a very, very strong case following this precedent, and I think it will be hard to refuse them except by saying that Congress is actually in favor of abortion, it does not consider abortion at all troubling, it is perfectly happy to have that funded and Federal taxpayer dollars entangled with that. I really do not think Congress wants to be in a position of saying to feminist groups, you are right; it is a matter of absolute urgent priority that this or that small matter of sexual etiquette be enforced. And I must say with respect, a lot of the requirements in the title IX regulations do seem to me disputable matters of taste and not fundamental principles.

But Congress is really going to have to say these things are absolutely fundamental, they must be imposed on everybody, and any taxpayer is right to be indignant that some of his money might somehow be entangled with this so-called discrimination, and then turn around and say to the prolife people, "Shut up, we are taking your money and spending it as we please, and it is none of your business."

It would be easy to imagine other examples, and I would be happy to imagine some for the Senator if he would like other examples.

Senator **HATCH**. I might add that Congress, in its infinite wisdom, will certainly find a way of splitting the hairs on that. I think you can almost count on it, but your point is an interesting one.

Mr. **RABKIN**. Good luck to you.

So I will not imagine other examples for you right now.

I will just say it seems to me pretty clear Federal funding should not be used as a club to coerce private institutions into what some people may define as proper norms of conduct or ideal norms of conduct. Nor should Federal dollars I think be regarded as too pure to stand the taint of less than ideal behavior, as some advocacy groups might define it, in recipient institutions. It really does disturb me that this bill seems to take a long stride toward freezing these extremist assumptions into Federal law.

I strongly urge this subcommittee to consider more modest and more cautious alternatives to the current bill, if indeed some legislation is felt to be necessary at all. And above all, I would urge this subcommittee to remember that the right to tolerance of differences, the right to enjoy the diversity of a pluralistic society, is the foundation of all other civil rights.

Thank you.

[The prepared statement of Jeremy A. Rabkin follows:]

PREPARED STATEMENT OF JEREMY A. RABKIN

At the outset, I would like to thank the Subcommittee for inviting me to appear today. And I would like to express particular appreciation for the Subcommittee's willingness to give careful thought to a measure that has thus far been the object of so much enthusiasm and so little reflection.

Congressional sponsors of this bill have repeatedly characterized it as a "simple" measure to restore the original legislative purpose to the affected civil rights laws. As a political scientist, I have devoted a large part of my professional career to studying the enforcement operations of the Office for Civil Rights (formerly in the Department of Health, Education and Welfare, now in the Department of Education), which conducts the bulk of enforcement activities under all four of the statutes to be amended by this bill. About the full consequences of this bill, I can only speculate. But one thing I am sure of: it is not a "simple" measure at all and its effects would undoubtedly go far beyond merely restoring the regulatory status quo, prior to the Supreme Court's decision in *Grove City College* v. *Bell*.

It is true that in many respects the present bill tracks the language and the implied scope of control in the original implementing regulations for the affected statutes. Yet the regulations implementing Title IX have been in force for nine years and the regulations implementing Title VI have now been in force for almost twenty years. If the Supreme Court's restrictive interpretation really marked a radical departure from past enforcement practice under these regulations, why was the Office for Civil Rights not brought up short by the courts much earlier? Part of the answer is that the agency's regulations actually do contain some restrictive clauses, narrowing their reach a good deal compared with the provisions of the present bill. Another part of the answer is that OCR has rarely tried—and rarely experienced any need—to test the full reach of its own regulations (and other enforcement agencies seem to have been even less aggressive, on the whole).

Grove City was an exception and a revealing one: a test case, it arose not out of OCR's efforts to correct any pattern of sex discrimination at the college but simply from the agency's effort to force Grove City College to agree, in principle, to abide by all its regulations on sex discrimination. The Supreme Court held that the regulations should apply only to the particular "program or activity" at Grove City that received federal financial assistance, not to the whole college. That holding, of course, was what set off the current effort to amend Title IX and the parallel civil rights laws. Too little attention, however, has been paid to the Court's other holding in the case, that Grove City's student aid and scholarship programs would be governed by the Title IX regulations, even though they received only indirect federal financial assistance, channelled through students at the college. In truth, the *Grove City* decision implicitly endorses and itself embodies the traditional enforcement theory applied to these statutes. It recognizes that even indirect federal funding may bring an institution within their coverage; it recognizes that even a small amount of federal aid may "affect" a wide portion of an institution's "activities"; it does not insist on a narrow or mechanically applied definition of the crucial term "program or activity."

Grove City College is a quite anomalous institution in that it has refused all other kinds of federal aid, apart from allowing its students to participate in federal student aid programs. In virtually any other institution, I believe OCR would have little difficulty showing that some aspect of federal aid affected or was affected by a pattern of sex discrimination it wished to reach under Title IX. I say this because in almost ten years of enforcement, the agency has never yet been permanently stymied from asserting jurisdiction over sex discrimination offenses in schools and colleges. The courts have almost invariably given the "program and activity" clause a broad enough reading to accommodate OCR's enforcement efforts. The one exception was the ruling by a number of courts that employees of schools and colleges could not generally be considered "participants" in an "education program or activity" and thus could not generally be protected by the Title IX regulations. But even here, the Supreme Court subsequently over-ruled these holdings, reasserting OCR's jurisdiction over employment discrimination with a broad reading of the "program or activity" clause.

It is not at all clear to me, therefore, that the *Grove City* decision really requires any congressional response to maintain vigorous and effective enforcement against sex discrimination in schools and colleges. If Congress really wants to ensure that every aspect of operations at educational institutions is safeguarded against sex discrimination, it might consider a carefully worded statute to this effect. Even here there will be problems, as I will try to explain later. But I am sure it is a mistake to assume that is all the current bill would do and still more of a mistake to assume that parallel effects would be achieved by amending the other civil rights statutes in the same manner.

One thing the bill seems to do is greatly enlarge the scope of the de-funding sanction for enforcement. Among other things, it defines a "recipient" of federal funding as "any State or political subdivision thereof . . . or any public or private agency, institution, or organization . . . to which Federal financial assistance is extended . . . *or which receives support from the extension of Federal financial assistance to any of its subunits.*" [emphasis added] Where the original statutes provide that funding may be withdrawn from the "particular program, or part thereof, in which . . . noncompliance has been . . . found," the current bill would remove all such program-specific language and simply allow the enforcing agency to withdraw federal "assistance which supports . . . noncompliance . . ." The bill evidently assumes that funding to some part of an institution "supports" discrimination in every other part—for otherwise the enforcing agency would be back to the problem of distinguishing "supported" from "unsupported" parts of an institution, which is the very problem the sponsors of this bill have said they want to eliminate by eliminating the program-specific language in the original statutes. On the face of it, then, the new language invites the inference that a finding of discrimination in one department of a particular state university, for example, could threaten federal funding to the entire university, indeed to the entire higher education system in that state, and arguably to all aspects of government in that state. This may appear a rather strained interpretation to some. But, after all, the Supreme Court thought it unacceptably strained to argue that ORC's "regulatory authority [should] follow federally aided students from classroom to classroom, building to building, or activity to activity"—and it was precisely this cautionary ruling that inspired the current efforts to amend Title IX and the other statutes.

I do not think this apparent expansion in the scale of the de-funding sanction will be of any real help to enforcement agencies. OCR's experience over the last twenty years suggests that the larger the scale of funding at stake, the greater the political pressures on the agency to reach a swift and accommodating settlement of its discrimination charges (which civil rights champions usually deride as a "sell-out"). But I am more concerned about the expansion in enforcement jurisdiction implied by the new language than the expansion in enforcement sanctions.

Not content with reaching the parent entity (however large) of every "subunit" receiving federal assistance, the proposed amendments would reach "any successor, assignee, or transferee of any such . . . entity or of any such subunit . . . ." Here again the language is alarmingly open-ended, more so, I believe, than the regulatory provisions it seems to incorporate. In the implementing regulations for Title IX, for example, the term "recipient" is defined as "any entity . . . which operates an education program or activity which receives or benefits from [Federal financial] assistance, including any subunit, successor, assignee, or transferee thereof." Here the reference seems to be to successors, assignees or transferees of the relevant education program, whereas the bill plainly refers to successors, assignees and transferees of the recipient institution or entity as a whole. It is hard to say how far they might be extended in the latter context. It seems quite clear, for example, that a private contractor who does paving work on university sidewalks cannot be considered a "transferee" of any "education program," regardless of how much he is paid. But I am not at all sure that this contractor would not be considered a "transferee" of the university, per se. Certainly a private developer who buys old school buildings to turn them into commercial properties would seem to be a successor or assignee or transferee of the public school system selling the buildings. Would the developer then be subject to Title IX? It would seem so from the careless phrasing of the amendments. Perhaps more distressingly for the developer, he would also be subject to the elaborate access requirements (wheelchair ramps, elevators and so on) and the elaborate requirements for assessing and assisting handicapped workers contained in the implementing regulations for Sec. 504 of the Rehabilitation Act. In truth, an astonishingly broad range of private actors and activities might suddenly be subject to these requirements, because unlike Title IX, Sec. 504 is not limited to "education" recipients. Of course, implementing regulations for the amended version of Sec. 504 might take a more restrictive approach to such ambiguous terms. But the past history of such regulations suggests that regulation-writers are likely to stake out the broadest jurisdictional claims possible, because this is what the affected advocacy or constituency groups demand. And courts may think twice about cutting expensive regulatory provisions back to scale, after considering the heated response provoked by the Supreme Court's decision in *Grove City*.

Even with Title IX there may be embarrassing consequences from the elimination of program-specific language in the current statute and the current regulations—and this quite apart from the problem of "transferees" and "assignees." In its current form, for example, Title IX includes an exemption for "an educational institution which is controlled by a religious organization if [the general prohibition on sex discrimination] would not be consistent with the religious tenets of such organization." Otherwise secular schools which make some provision for religious services need not fear that these will be covered under the current version of Title IX, however, since it is an accepted constitutional principle that the federal government may not provide funding for any religious "program or activity" in any case. Under the institution-wide approach contemplated by the current bill, on the other hand, it would seem quite possible to challenge the separate seating of men and women in Orthodox Jewish services or the restriction of priestly functions to men in Catholic mass—even if the "recipient" college did no more than provide building space for these services. I am quite confident that politically accountable enforcement agencies will never press the question of sex discrimination in such cases on their own. But the Supreme Court has held that Title IX provides a private right of action and the example of professional anti-religious litigators like Madlyn Murray O'Hair ought to give one pause. Similarly, under the new version of Title IX, campus R.O.T.C. units can come under challenge and despite great efforts to integrate women into the armed services in recent years, I have little doubt there will still be opportunities for mischief here.

The current version of Title IX already has several amusingly picayune amendments to its general prohibition on sex discrimination—such as the exception for father-son or mother-daughter school activities or the one for scholarship awards in "beauty" pageants—which represent panicky congressional second-thoughts to the careless sweep of its original provisions. The implications of the new version of Title IX—and still more of the new versions of Sec. 504 and the age discrimination act—will surely produce many more unpleasant surprises and many more panicky amendment efforts. I fear that such a process will end up doing considerable harm even to the interests of the intended beneficiaries of these statutes. I am sure it will do some harm to the public repute of Congress itself. Surely it would be wiser this time to consider the consequences before sweeping new provisions are added to our civil rights laws.

I would also urge this subcommittee to pause long and hard over the implications of the current bill for another reason. Beyond its implications for civil rights enforcement, the bill may have very disturbing implications as a constitutional and political precedent in other fields. In *Katzenbach* v. *Morgan* the Supreme Court suggested that Congress may have independent authority to expand the substantive reach of the Fourteenth Amendment. Taken together, the provisions of the current bill constitute a very strong congressional statement that any government funding to a private institution makes the entire institution subject to the norms affecting government, itself. If the bill is enacted in its current form, it might well justify the inference that any aid to a religious institution should be viewed as unconstitutional government aid to religion—just as the proponents of the Civil Rights Act of 1984 have argued that any aid to an institution which somewhere practices discrimination must be viewed as unlawful government "support" for discrimination. Perhaps it is alarmist to fear that this congressional precedent may encourage the Supreme Court to impose further restrictions on government aid to religious institutions. But the Court has already gone further in this direction than many constitutional scholars consider reasonable or appropriate and it might therefore be most prudent of Congress to avoid giving the Court a further push in this direction. Similarly, the Court went very far in the 1970s in imposing due process requirements in a wide range of novel circumstances. I do not find it inconceivable that the present bill, if enacted, might be urged on the Court as a precedent for extending due process requirements to private firms receiving federal money. And I must say I am quite uneasy at the prospect of Chrysler or some future beneficiary of federal bailouts being required to provide due process before firing any of its mid-level mangers.

Even if one is inclined to dismiss such speculative implications of the bill as a constitutional precedent, its implications as a political precedent cannot be ignored. Many feminist groups assert that there is utmost urgency about ensuring women's teams be funded on an equal basis with men's teams in college athletic programs. Thus they have expressed outrage that, as a consequence of the *Grove City* decision, federal money may continue to flow to universities that do not maintain such a balance. With all respect, I would point out that not everyone shares this priority and some people have very different priorities, indeed. Many people believe that abortion is equivalent to murder and find it outrageous that their tax dollars should be used to support such conduct. If the Civil Rights Act of 1984 is enacted, I do not see how the Senate can dismiss pro-life advocates demanding that the Hyde Amendment be expanded to forbid abortions in any hospital which receives patients with Medicare or Medicaid funding. Actual abortions at such hospitals, after all, are "supported" as much by this indirect funding as the hypothetical sex discrimination at Grove City College was "supported" by federal grants to its students.

Other examples might easily be imagined but I do not think it is necessary to belabor the point. If there is a consensus that certain practices are clearly immoral, we should have the courage to ban them directly. Federal funding should not be used as a club to coerce private institutions into (what some would define as) ideal norms of conduct. Nor should federal dollars be regarded as too pure to stand the taint of less than ideal behavior (as some would define it) in recipient institutions. The proposed Civil Rights Act of 1984 takes a long stride toward freezing these extremist assumptions into federal law. I strongly urge this subcommittee to consider more modest and more cautious alternatives to the current bill, if some legislation is felt to be necessary. Above all, I would urge this subcommittee to remember that the right to tolerance of differences, the right to enjoy the diversity of a pluralistic society, is the foundation of all other "civil rights."

Thank you.

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CONGRESS OWES THE SUPREME COURT A RESPECTFUL PAUSE ON *GROVE CITY*

by Jeremy Rabkin

Initial news accounts of the Supreme Court's decision in *Grove City College* v. *Bell* almost uniformly played up the immediate partisan significance of the result: in this case, the civil rights lawyers at the Reagan Justice Department had finally "won one." Within hours, Congress was astir with plans to overturn the result by legislative action, as women's groups and civil rights activists demanded. But the underlying issues here are too important to treat the *Grove City* decision as simply one more occasion for political one-upsmanship. An impulsive congressional response risks serious harm to the long-term credibility of federal civil rights enforcement.

The *Grove City* case tested the reach of Title IX of the Education Amendments of 1972, which prohibits "discrimination on the basis of sex" in "any education program or activity receiving federal financial assistance." Grove City College, though never actually accused of any discriminatory practices, had refused to sign a standard "assurance of compliance" with the federal regulations implementing Title IX. Grove City maintained that it was not covered by Title IX because it had never accepted any direct funding from the federal government. The Education Department (represented in the suit by Education Secretary Terrel Bell) insisted that the college was still covered by Title IX, so long as its students continued to participate in federal student aid programs. The Supreme Court upheld the government's claims that the college itself was a beneficiary of student aid funding. But a majority of six justices also ruled--in agreement with government lawyers--that only the student financial aid program at Grove City, not the college as a whole, was the "program or activity receiving federal financial assistance." Therefore, according to the Court, only this aspect of Grove City's operations need comply with Title IX requirements. The critics insist that this "program specific" interpretation of Title IX contradicts the original purpose of the statute. And they are now urging Congress to amend Title IX to confirm that if any particular program of a school receives federal funding, the entire school must comply with the regulations on sex discrimination.

The first thing to notice about the Court's decision is that, despite what critics have claimed, it rests on a rather persuasive interpretation of the original intent behind Title IX. In no way can the decision be fairly characterized as a radical departure from previous constructions of the statute. It is true that the Supreme Court's decision cut back on the ruling of the U.S. Court of Appeals for the 3rd Circuit (and the position of the Education Department under the Carter administration) that *all* of Grove City College constituted a "program or activity" governed by Title IX. But this expansive interpretation of Title IX had been rejected by federal appeals courts in other circuits in a number of other cases. And the implementing regulations for Title IX, originally issued by the Department of Health, Educaiton and Welfare in 1975, have always avoided any direct definition of the crucial phrase "program or activity." Indeed, the Supreme Court's *Grove City* decision itself does not rule out fairly broad definitions of the relevant "program or activity" for future enforcement actions involving different sorts of federal funding.

The fact that the Court's decision has been widely denounced by feminist organizations, then, does not mean that the Court incorrectly interpreted what Congress intended *when it enacted Title IX in 1972*. And this in itself is one reason to delay any impulsive effort to overturn the Court's ruling. Courts are always tempted to twist the meaning of earlier statutes to accomodate changing political sentiments. Particularly in the civil rights field, the courts have often acted as if the key to statutory construction was the current preference of civil rights groups, rather than the intentions of the enacting Congress. Thus Justice Brennan -- who now angrily criticizes the majority decision in Grove City as a misreading of the original intent of Title IX -- solemnly declared in the Weber case a few years ago that the 1964 Civil Rights Act was no barrier to reverse discrimination and racial quotas. His opinion in that case bilithely ignored the well-known fact that the sponsors of the legislation in 1964 had repeatedly assured the nation that it could never accomodate such practices.

This sort of maneuvering, of course, undermines both representative government and the rule of law. It reenforces the opposition to new legislation -- including new civil rights legislation -- by teaching opponents that current legislative compromises cannot be relied upon once the law gets into the courts. And it breeds a cynicism about law that encourages new administrations to disregard legislative intent in fashioning enforcement policies -- just as the Reagan administration is so often accused of doing. When the Supreme Court has the courage to reassert the original meaning of a stature, therefore, even civil rights activitists ought to pause before trying to slap the Court down. With the prospect of a more conservative political atmosphere in the coming years, feminists and civil rights advocates have as much stake as anyone in maintaining the integrity of our legal system.

Of course, Congress is always free to change its mind, enacting new legislation with the avowed purpose of altering earlier policy. But it ought first to make sure it understands the logic of the earlier policy and the implications of the proposed changes. Critics of the Grove City decision warn that its implications go beyond Title IX, itself. This is quite true -- and anothe reason why Congress should take pause. The language of Title IX is patterned after Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of "race, color or national origin") ans was borrowed in turn for Sec. 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of handicap). All these statutes have implications for a wider debate on constitutional doctrine, because Title VI was understood to embody the federal government's constitutional obligation not to subsidize racial discrimination. Those who want to overturn Grove City contend that government funding to any part of an institution should give the federal government jursidiction over -- and responsibility for -- ensuring that all aspects of that institution's operations comply with federal norms. It is hard to see by what logic this principle can be confined to norms governing sex discrimination.

The Reagan administration, for example, is now trying to extend Sec. 504 to ensure life-saving medical treatment for deformed infants. In fact, few hospitals now receive direct federal assistance for obstetric or pediatric services. But under the principle contended for by the opponents of Grove City, federal surveillance of infant care practices could be extended to every hospital in American that received even partial or indirect funding for some unrelated aspects of its operations. Congress has recently enacted a law requiring colleges to certify that students have registered for the draft, before allowing them to participate in federal student aid programs. Some colleges have refused to comply. Applying the same principle demanded for Title IX, conservatives would be entitled to insist that all federal funding to such colleges be terminated.

If congressional endorsement of this principle for Title IX influences the Supreme Court's view of parallel constitutional issues, we can anticipate a bitter exacerbation of our already overheated national debates on abortion and church-state relations. If federally funded institutions are subject to federal norms in all their operations, how can the federal government be permitted to fund even limited secular activities in religiously- affiliated schools or colleges (as is now permitted by the Supreme Court)? How can the federal government continue to fund hospitals that refuse to perform abortions? At best, giving a sweeping reach to Title IX would be a dangerous precedent; at worst, a powerful push to the Supreme Court in a socially disastrous direction.

All of these concerns may be brushed aside by those who regard the fight against sex discrimination as their very highest priority. But even if

Congress is determined to view the question in such narrow terms, it should take another look at *Grove City* before rushing to overturn it. On paper, the threat to terminate federal funding to discriminatory institutions may seem a powerful enforcement tool. But the stark fact is that in the whole history of Title IX, *no institution has ever lost its federal funding for practicing sex discrimination*. The Education Department hates to cut off funding, because this invariably punishes innocent students more than the offending school officials -- and makes a very bad impression on local congressmen and senators. If all funding to a school is put at risk by discrimination in a particular program, the government will be even more reluctant to invoke its sanction. Amending Title IX to expand its reach will simple exacerbate the current enforcement pattern, in which even limited discrimination complaints typically consume years of wrangling and legal maneuvering, often spilling over into unrelated charges as the initial complaint proves too hard to resolve.

It is indeed true, as the critics charge, that the Supreme Court's program-specific approach to Title IX may make it hard for the government to reach discrimination in school programs that do not receive federal funding -- such as athletics. It is even possible that some schools will refuse federal funding of particular programs in order to evade compliance with Title IX requirements. There is a simple solution to this problem, however. Let Congress outlaw sex discrimination in any area of school activities where it finds differential treatment of men and women (or boys and girls) to be objectionable and prevalent. There is no need to tie such prohibitions to federal funding. In Title VI of the 1964 Civil Rights Act, Congress prohibited sex discrimination in private employment, without regard to whether employers received "federal financial assistance."

Direct prohibitions on sex discrimination in education would be much easier to enforce and would not raise disturbing implications for other policy fields. Yet none of the critics of *Grove City* have proposed such a course. That is quite revealing. Instead of trying to persuade Congress to enact specific controls on the merits, activists would rather rebuke the Supreme Court for failing to do their work for them. Congress owes the country a more considered policy than a hasty pandering to such petulance.

Senator HATCH. Thank you, Professor Rabkin. I appreciate having your testimony.

Professor Fried, we will turn to you.

STATEMENT OF PROF. CHARLES FRIED

Mr. FRIED. Thank you, Senator Hatch.

If I may, I would like to start out on a very brief personal note because my only other contact with the Committee on the Judiciary was when Senator Kennedy was chairman and he asked my views on the subject of confirmation of judges who belong to racially discriminatory clubs. I was very glad to advise the committee on that occasion in very strong terms that it should deny confirmation to any nominee for a judgeship who did not measure up to what I consider to be a very high ideal and resign from such a club. And I would like to make that remark as a kind of context for the other views I will be stating. Because it does seem to me that this bill, should it become law, would represent our legislative process at its worst. It would make major changes in the structure of the antidiscrimination laws and in the balance of responsibility between the Federal Government and the States, in the balance between the responsibilities and prerogatives of private institutions and bureaucratic authority over those institutions. It would greatly enlarge the scope of agency discretion and do so in an unsystematic, haphazard and overlapping way. It will invite a monumental increase in litigation in the Federal courts by private parties while providing little or no basis for Federal judges to discipline and restrain that litigation. And it does all this without any showing of a demonstrated need. It does this all on the wholly spurious ground that we have here nothing more than a technical amendment to a number of statutes, a technical amendment necessitated to remedy the effect of an unfortunate technical Supreme Court decision.

Let me just outline what this bill actually would do. Section 2 of the bill would have the effect of placing under Federal scrutiny every program of an educational institution which receives a dollar of Federal aid anywhere in that institution.

Senator HATCH. Directly or indirectly?

Mr. FRIED. Directly or indirectly.

It would then go on to say that if any institution which is not primarily an educational institution receives Federal money and not educational money, and if such an institution has an educational program somewhere, that education program would also be covered.

Now, it seems to me those are not technical amendments. Those are major increases in the scope of the bill.

Having done that, having worked those changes, there are similar changes in title VI which deals with discrimination on the basis of race, color, national origin by governmental recipients, and section 504 which deals with discrimination against the handicapped, and that too removes the program specific language and simply covers any activity whatever of a recipient of a dollar of aid in any of its activities and spreads it to everyone of those activities, including, it seems, the activities of transferees from those agencies.

This is not by any means a careful piece of legislation. This is a case where having found fault with the Supreme Court's decision in Grove City in the interpretation of their program specificity language of title IX, the draftsmen of this bill have proceeded mechanically and thoughtlessly to extirpate that same language wherever it appears in the antidiscrimination provisions throughout the United States Code. This is not measuring the remedy by any demonstrated evil. It looks rather more like legislation by word processing, search and globally replace.

Now, let me just suggest a number of things that this legislation, allegedly merely technical, might do. Here are some examples which occurred to me.

Let us say that a university owns for investment purposes only rental housing, and in that housing there have been a number of assaults against women. The women demand that there be security provisions in that apartment building, including doorman and closed circuit television. Refusal to do so might subject the university to a private suit under an effects test because the effect of this decreased security would be to discriminate against women.

Similarly, a university press might be required to justify the books which it selects to publish on the grounds that they yield too few books, either by women or of relevance to women.

Consider a police department whose enforcement activities, as in the case of shoplifting or welfare fraud, may bear disproportionately on women. That would become subject to title IX if any of its activities might be called educational and if that police force is in receipt of a dollar of Federal aid.

Imagine an organization like the Educational Testing Service which is a vendor to educational recipients. Will it be subject to an effects test lawsuit if the results of the many tests which it devises and administers has the effect of bearing disproportionately on women?

Consider then as we move on to the allegedly technical emendation of title VI. Imagine the franchise procedures of State and local governments, the distribution of taxi medallions, cable TV franchises, bus franchises. It would seem about all of those activities would be subject to effects tests, private litigation by parties claiming that selling rather than distributing by lottery, for instance, a cable TV franchise bears disproportionately on minority groups who may have lesser financial resources to buy those franchises.

Similarly, consider real estate licensure, taxi drivers' licenses, bar exams, medical certification, all of which are activities of State government and all of which are subject by this legislation to effects test scrutiny under the revised title VI.

Now, Senator Kennedy has written in the New York Times, together with Senator Packwood, that "the sole purpose of the Civil Rights Act of 1984 is to undo the effects of *Grove City* and to restore to each of these laws the meaning we all thought they had in the past. This is what the bill does and no more."

Now, with respect, I find this proposition somewhat puzzling in view of the wording that was chosen and in view of the wording that was available and not used. The Senators go on to proclaim that the warning of extensive disturbing effects of their bill are dead wrong, but they did not explain in their letter why they are dead wrong. And what is particularly troublesome about these protestations is that Senator Kennedy, on the floor of the Senate, said as follows, that if a State prison were to receive—I quote now—"Federal funding to develop a better inmate classification system and no other Federal assistance, its education activities and related benefits, such as classes and training programs, would be covered by title IX even though they receive no Federal money."

I find it hard to square that boast on the floor of the Senate with his statement in the New York Times that this bill is meant to be simply a restoration of the law as "we all" understood it, including I suppose those Senators who had insisted on and obtained the program specificity language in these laws when they were first passed.

[The prepared statement of Charles Fried and a letter subsequently submitted follow:]

PREPARED STATEMENT OF CHARLES FRIED

Thank you very much for asking me to appear before you this morning. My name is Charles Fried. I have taught law at the Harvard Law School for the last 24 years. My interest in Senate 2568 is as a citizen and as a student of the legal system.

0.1 A General View of S.2568

This Bill represents our legislative process at its worst. It would make major changes in the structure of our antidiscrimination laws, in the balance of responsiblity between the federal government and the states, in the balance between the responsibilities and prerogatives of private institutions and bureaucratic authority over those institutions. It will greatly enlarge the scope of agency discretion, and do so in an unsystematic, haphazard and overlapping way. It will invite a monumental increase in litigation in the federal courts, while providing little basis for federal judges to discipline and restrain that litigation. And it does all this without any showing of need; it does all this on the wholly spurious ground that we have here nothing more than a technical amendment to a number of statutes, a technical amendment necessitated to remedy the effect of an unfortunate, technical Supreme Court decision.

Indeed the very way in which the Bill is drafted makes it impossible to discover on the face of it the major and sweeping changes that it accomplishes. It is hard for me to believe that all of the distinguished Senators whose names appear at the head of this Bill have worked through and grasped what it will accomplish.

0.2 The "Evil" to be Remedied: Grove City College v. Bell

The occasion for Senate 2568 is the decision of the Supreme Court in Grove City College v. Bell, which was handed down on February 28, 1984. A number of commentators, a number of senators and congressmen have claimed that the Supreme Court misunderstood the intent of the Senate in that case, and so they have produced this Bill to remedy that error. As a response to the Grove City Case this Bill is like using a nuclear bomb, devestating a complex and carefully patterned institutional landscape, to kill a gnat--and it is not even clear that the gnat exists.

Title IX of the Education Amendments of 1972 provides that when a state or private institution--in the Grove City Case the institution was a private institution--receives money for an educational program from the federal government, that money may be cut off if the institution discriminates on the basis of gender. In the Grove City Case the Supreme Court held that the statute placed under federal scrutiny only the particular program which received the federal aid, and not the whole institution in which the program was situated. So in Grove City when the only federal monies flowing to the College were through scholarships paid directly to students, only the financial aid office might be placed under federal scrutiny, not the whole College. It is this decision which was thought to be wrong, which was claimed to misconceive the original congressional intent.

0.3 The Reach of S.2568

Section 2 of the Bill would have the effect of placing under federal scrutiny for gender discrimination any educational program of any public or private institution which receives a dollar of federal aid, even if that federal aid is paid to portions of the institution which have nothing to do with education. Moreover it places under federal gender discrimination jurisdiction all programs of an educational institution, whether these programs have anything to do with education or not, if the educational institution receives a dollar of federal aid to any aspect of its program.

Having worked these changes in Section 2, Senate 2568 then also amends the Rehabilitation Act of 1973, which concerns itself with discrimination against the handicapped, so that there too there is a predicate for federal intervention--both bureaucratic and judicial--against any part or aspect of a public or private entity which receives a dollar of federal aid in the same or any other corner or portion of that institution. And then Section 4 goes on to amend the Age Discrimination Act of 1975 in the same way. And in Section 5 the Bill amends Title VI of the Civil Rights Act, which concerns itself with discrimination on the basis of race, color, or national origin, and would lay a predicate for federal bureaucratic and judicial intervention in any and every program of a public or private institution which receives a dollar of federal aid in the same or any other corner of the work of that public or private institution.

In other words, Senate 2568 having found fault with the Supreme Court's interpretation of the program specificity language in Title IX has proceeded mechanically to extirpate that language wherever it appears in anti-discrimination provisions throughout the United States Code. This is not thoughtful legislation. This is not measuring the remedy by the evil. It looks rather more like legislation by work processor--search and globally replace.

Before I sketch out for you the devastation this technical-seeming Bill would work in the careful institutional balance of our antidiscrimination laws, before I describe for you the havoc which would be raised by this legislative nuclear bomb, let's see if the gnat it is aimed at even exists.

0.4 Does an "Evil" Exist to be Remedied?

As a result of the Supreme Court's Grove City College decision, that small private institution is dispensed from executing an assurance to the Department of Education that it does not discriminate on the basis of gender in all of its programs, but it must still give that assurance in respect to its financial aid program. Is this such a disaster? Well, as you know, Grove City College has never been accused by anybody of discriminating against anyone. Its record in this regard is exemplary. It has fought this case because it would like to be left alone to do its very good work--as everyone agrees--among men and women of all races without having to answer to the federal bureaucracy, without having to file endless forms about every part of its operations. After the Supreme Court's decision, they will not be able to do that entirely-- receipt by some of their students of Pell Grants puts them under the Department of Education's Title IX thumb at least in respect to their financial aid program, but no more. Surely there is no great tragedy or travesty here. No evil requiring such a massive legislative response.

Perhaps, then, the gnat exists elsewhere--not at Grove City College. Perhaps this wider tool of federal intrusion is necessary to remedy a wider evil, and the innocent Grove City Colleges must pay what is, after all, not such a great price.

There is no showing that women are being deprived of educational opportunity, educational equality, or would be so deprived by the Grove City College decision. Is it the principle of the thing, then? Or the potential for mischief? But what principle, what mischief? Even if the Grove City College decision were allowed to stand, the Congress would hardly be seen as approving gender discrimination. Most private institutions receiving federal funds are not so particular as Grove City College, not so eager to do things on their own, with the result that even under the most restrictive reading of the Supreme Court's decision there is little if any room for gender discrimination in most such institutions. Where the educational opportunities are afforded by state or local governments the Constitution itself guarantees equality of opportunity under the Equal Protection Clause. Under the Supreme Court's own decision this Term in the Bob Jones University Case institutions enjoying the benefit of federal charitable deductions are further constrained to respect the principle of equality. Finally, Title VII of the Civil Rights Act is a sweeping mandate against all discrimination in employment --public or private

So I ask again where is the evil at which this legislation is directed? Where is the showing of any necessity for stamping out the results of the Grove City College decision, and with it trampling on Grove City College's desire to preserve some measure of autonomy from federal bureaucratic intrusion? Indeed, one might view this legislation as being born not out of some careful study of needs, but out of a reflex of congressional pique.

There is one sensible basis for legislation: that Grove City was too restrictive and ungenerous a reading of the particular statutory language in Title IX. It is z an arguable and not far-fetched position that Congress originally contemplated implicating more than an institution's financial aid program if that institution's students received federal scholarship money. The students' tuition does flow through the whole college or university, the students sit in classes with other students, and so the argument might be made that after all the whole program to which these students are exposed should fall under Title IX and not just the scholarship program. The legislative history of Section 901(a) of Title IX makes it abundantly clear that its proponents --proponents like Senator Bayh,[,1] who were much concerned with discrimination against women -- viewed program-specificity as an integral aspect of that provision. The suggestion that the Supreme Court somehow twisted Congressional purpose by also insisting on program-specificity seems to me one which a fair reading of the materials just will not bear. Nor was the Grove City case a departure in the Court's own dealing with the statute, since it had already reached a similar conclusion in North Haven B'd of Educ. v. Bell. What may, therefore, be plausibly argued is that the Supreme Court took too narrow a view of what program-specificity entailed in a case such as Grove City, and that program-specificity itself might mean coverage for all of a college's educational programs, when its students receive federally funded scholarships.

0.5 S.2568 Upsets the Present Carefully Crafted Institutional Balance of Responsibilities

0.5.1 The Changes in Tile IX Go Far Beyond Even The Supposed Occasion

Even if the Grove City College decision needs to be reversed, Section 2 goes far beyond reversing that decision. It is a reasonable reading of this rather unreasonable piece of legislation that every activity of an educational recipient--whether that activity is educational or not--would be subject to Title IX. So if a private educational institution owns and manages real estate, runs a radio station, publishes books, all of these would be swept into the net of the now revised Title IX.

Now sweeping them in would do more than simply expand opportunities for women. For unlike the Constitution, unlike the ordinary notion of equal opportunity, Title IX includes an effects test, so that even where there is no purpose to discriminate, perfectly innocent, perfectly sensible practices which have the underlying effect of yielding fewer benefits proportionately to women than to men are subject to the strictures of Title IX. And this in spite of the fact that Title VII and Section 1982 of 42 U.S.C and Executive Order 11063 already subject such institutions, in so far as they are employers or providers of housing, to stringent federal regulation.

But Section 2 of Senate 2568 goes further still. Take the case of a public or private institution which is not primarily an educational institution--not a school or university, but say a state or county government, or a hospital or prison. If any program anywhere in that public or private institution, in that governmental unit, receives a dollar of federal aid for any purpose, then educational programs of that governmental unit or institution fall within the scope of Title IX, fall under the jurisdiction of the Department of Education, with its reporting requirements, regulations and effects test, even though those educational programs are not themselves the recipients of federal aid.

0.5.2 Sweeping Effect of the Changes in Title VI

The revision of the language of Title VI proposed by Senate 2568 is in some respects even more unsettling of established institutional lines of responsibility. Title VI prohibits discrimination in state and local programs which receive federal monies, discrimination on the basis of race, color or national origin. The effect of Section 5 of Sentate 2568 would be to subject every single activity of state or local governments to the supervision of every federal agency which disburses any money to any part of such a state or local governmental entity. Once again

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1. Senator Bayh stated that the "effect of termination of funds is limited to the particular entity and program (emphasis added) in which such noncompliance is found." Quoted in North Haven B'd of Educ. v. Bell, 456 U.S. 512, at 537.

it should be remembered that Title VII already enforces equality of employement opportunities under an effects test on virtually all employers, and the Equal Protection clause of the Constitution forbids intentional discrimination by state and local governments in any aspect whatever of any of their programs. By sweeping aside the programs specificity language of the present Title VI, the congress would be subjecting every single state and local government activity to multiple reporting requirements and expanded antidiscrimination scrutiny under an effects test.

As I have stated, there is a fair argument that the Grove City Case--which is the purported occasion for this legislation--gave too narrow a reading to the program specificity language in Title IX, as it applies to federally funded scholarships. But this legislation goes on to make major changes in the scope and coverage of Title VI, which focusses on the quite different area of federal aid to state and local governments. And it does so without any showing that a need exists, that a problem (such as that raised by Grove City) exists, or that institutionally and bureaucratically this is a sensible way to solve what problems there may be.

Under this casually sweeping piece of legislation it would become an open question whether a city which sold taxi medalions or cable television franchises to the highest bidder was in violation of the law, because the effect of such a scheme--where quite plainly there is no intention to discriminate--is to bear differentially on different racial groups.

0.5.3 Sweeping Effect of the Changes in the Rehabilitation Act

And Section 3 of Senate 2568 has a similarly far-reaching but unexamined effect in respect to disadvantages imposed upon the handicapped. There is little doubt that the situation of the handicapped deserves fuller, more comprehensive federal attention. But the word processor/global-search-and-replace strategy of this piece of legislation hardly represents the intelligent attention which this serious problem deserves. As a result of this legislation it is fairly arguable that any public or private recipient of federal aid to any of its programs, to any corner of its operation, is thereby wholly responsible in all of its operations to assure that the effects [,2] of its choices do not burden the handicapped, even though there may be no purpose at all to discriminate against the handicapped.

0.5.4 Possible Inclusion of Vendors and Other Remote Beneficiaries

So sweeping and undiscriminating is the language of Senate 2568 that a more than plausible interpretation would have it that not only the totality of recipient institutions -- public and private -- are swept into the bureaucratic jurisdiction of Title VI, Title IX and Section 504 with their effects tests, but that even persons doing business with such public or private institutions might to some unspecified extent be subject to these provisions now for the first time. A grocery store taking food stamps in payment for groceries might be subject to Section 504. A bookstore catering to college students might be subject to Titles VI and IX and Section 504--although of course it is already subject to Title VII in respect to its employement practices.

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2. On the applicability of the effects test to Section 504 of the Rehabilitation Act, see Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983)

0.6 The Bill's "Pin-point" Limitation on Funds Cut-Offs is Insufficient to Contain the Bill's Excessive Reach

The Bill limits funds cut-off authority to those funds which are found to "support" the non-compliance. But this limitation does not protect against the apprehended evil of possibly open-ended subjection to federal effects test scrutiny for sex, age, handicap and race discrimination. First and most importantly, each of these provisions would give rise to a private action in federal court, and such private action would not be subject to the "support" limitation. Similarly the Department of Justice would be empowered to seek injunctive relief without regard to such a limitation. And finally, it is far from clear that the Bill would not authorize agencies to issue regulations which travel outside the "supported discrimination" category --e.g. regulations requiring extensive reports in respect to non-related, unfunded activities by federal aid recipients. Failure to comply with such far-ranging regulations might then constitute sufficient non-compliance to justify funds cut-offs after all.

0.7 Multiple Overlapping and Proliferating Reporting and Other Compliance Burdens

In their excessive and undiscriminating zeal to spread the federal anti-discriminatory net as widely as possible the drafters of S. 2568 have created a situation where recipients of federal funds from any federal agency in any corner of their operations will be subject to reporting requirements and compliance reviews by each such funding agency in respect to all --even totally unrelated -- activities. A university would have to report to D.O. Ed. regarding its investment real estate holdings and its publishing operations. A state receiving highway moneys would subject all of its agencies and all of its subunits to reporting requirements to D.O.T. regarding its health policies. A private business doing work as a defense contractor would have to report on all of its practices to D.O.D.

It is hard to believe that the sponsors of S.2568 intended to impose such pointless paperwork burdens on state and local governments which they represent. Yet there is no way to avoid these burdens under the Bill as drafted, for it is the very strategy of that Bill to extend federal authority to its utmost corner, once the predicate of federal funding has been laid. It is that strategy which is mistaken and should be reconsidered.

0.8 Legislative Responsibility and the Parade of Horribles

Now it might be said that this parade of horribles is unrealistic. That these are stories to frighten children with. These things will not come to pass. The bureaucracy must write regulations and in so doing it will exercise restraint, won't it? An agency must make choices, and it will use common sense, won't it? Will it? Such a vainly reassuring response to what I consider wholly justified objections would be a symptom of one of the serious diseases afflicting the legislative process and the legislation which it produces.

0.8.1 Passing the Buck to Bureaucrats and Judges

The reflex to write legislation as broad as the earth and as high as the sky hoping that some agency, some bureaucrat will exercise the restraint and commonsense which Congress had not the time or the wit to devise is the besetting affliction of the United States Code. It represents a dereliction of duty on the part of legislators, who are supposed to think through what they are doing instead of broadly and vaguely pointing in the direction of the problem, hoping that somebody else will do the thinking for them.

Observers of every political stripe have inveighed at some time or another against the flood of regulations, the tidal wave of litigation, and the attendant usurpations by both bureaucrats and federal judges of a power which should be the people's, that is the Congress's. And yet a Congress that would contemplate passing such a sweeping, ill-thought out, unprepared piece of legislation as S. 2568 is exactly responsible for the uncertainties which it then leaves to others--bureaucrats and judges--to sort out.

But this complaint apart, there is no basis for the confidence that bureaucrats and judges will exercise restraint and common sense where Congress has failed to do so. You and I know perfectly well that legislation like this is on a ratchet; it goes in one direction only--so that it will be with us for generations to come. Over those generations there is no reason for confidence that there will not be scores of federal judges exercising less than common sense, scores of bureaucrats exercising the opposite of restraint.

0.8.2 Pressure on Agencies to Push Authority to its Limits

Even if agency heads were inclined to be restrained, the law may not allow them to be. The possibility of law suits, the threat even of federal officials' personal liability as under the recent decisions in Harlow & Butterfield v. Fitzgerald, 102 S. Ct. 2727 (1982) and National Black Police Ass'n v. Velde, 712 F. 2d 569 (D.C. Cir. 1983), cert. denied (1984) will quickly dampen any inclination towards restraint which might exist within the bureaucracy.

0.8.3 Unleashing Private Law Suits

Finally, even if restraint were imposed by the bureaucracy every one of these antidiscrimination statutes--Title IX, Title VI, the Rehabilitation Act, the Age Discrimination Act--allows for private causes of action against the recipients of federal monies. If nothing else should give this Committee pause, then the prospect of the immense increase in the scope for such private causes of action--with very tempting fee awards to successful attorneys--should cause the Senate to think twice about this Bill. These private causes of action allow private parties to sue state and local governments, private recipients, perhaps even those doing business with recipients of federal aid to enforce the now expanded definitions of discrimination.

0.8.3.1 Possibly Crushing Money Damages

Heretofore, and by narrow margins, the Supreme Court has in a number of these statutes applied what might be called the Pennhurst Doctrine by which a private party bringing an action under any of these statutes can obtain only prospective relief, not "make whole"--i.e. money -- damages. (Of course, the private party's lawyer may be able to obtain legal fees by award of the court even if his client obtains only prospective relief, no money damages.) Yet the sweep of Senate 2568 is such that the rather fragile reasoning in the Pennhurst Case, recently narrowly reaffirmed in the Guardins Case, might no longer hold. The minority view, urged by Justice Marshall, that Congress intended to use the federal aid as a jurisdictional predicate for proclaiming a right, is a view which would have considerably more force if S. 2568 were to become law. And with that greater force, Justice Marshall's view that in all of these instances state and local governments, private businesses and charitable institutions, should be liable for money damages might very well prevail.

I ask you to pause and think carefully just what it is you are doing in this Bill and why. Thank you very much.

APPENDIX -- EXAMPLES

1. Unrelated Non-Educational Activities of Educational Recipients under Revised Title IX

In the wake of a well-publicized series of assaults against women, a public interest law firm might bring a class action against a university owning apartment buildings for investment purposes claiming that failure to provide guards and other security precautions in these buildings has the effect of discriminating against women.

In any event all such unrelated activities might be required to file compliance forms and statistics with D. O. Ed., even though they probably do so already under with different agencies such as H.U.D., OFCCP, EEOC under other provisions of law.

2. Non-Recipient Educational Activities of Recipients of Non-Educational Federal Funds

A hospital receiving federal moneys for medical research would be subject to a private suit alleging that an unrelated educational activity --say, a program to train midwives -- has the effect of discriminating on the basis of gender.

A police department which received federal moneys used to upgrade communications equipment would be subject to a private suit alleging that a program designed to educate merchants regarding ways to deter shoplifting or to educate welfare agencies regarding detection of certain categories of welfare fraud has the effect of discriminating against women, if those subject to apprehension are disproportionately women.

Testing services such a Educational Testing which receive any federal money directly or as contractors of institutions that receive such money would be subject to effects test private suits if scores on their tests do not have the same distribution for men as for women.

State certification procedures such as teacher certification, bar exams or drivers education would be subject to effect test private suits by disappointed applicants on the ground that testing is an educational activity.

3. Extension of Title VI to Unrelated Activities

Any state, county or town receiving federal assistance anywhere in its programs would be subject to private suit under an effects test if its bar exams, real estate licensure exams, franchise allocation procedures --e.g. for bus or Cable TV franchises --or contracting procedures, though facially neutral and without discriminatory intent, had a disparate impact on minority applicants.

As in paragraph 2 above, testing services performing testing under contract with state agencies would have to justify under a Title VI effects test any disparate impact which their tests might have for admission to programs or for enjoyment of benefits.

4. Extension of the Rehabilitation Act of 1973 to Unrelated Activities

A TV station owned in part by a university recipient of federal aid might be sued by a public interest group representing deaf person under an effects test for failure to caption all of its programs for the hearing impaired.

A theater or music recipient of an NEA grant would be subject to private suit if it performed in a hall which did not provide satisfactory access to handicapped persons.

Private movie theaters showing a film funded in part by NEA grants might similarly be subject to private suits for failure to provide handicap access.

State and non-profit recipients of federal moneys would be subject to private suits by various categories of physically, emotionally and mentally handicapped persons questioning their decisions to continue, discontinue or modify programs relating to those groups, even if those programs have not been the recipients of federal funds. In Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983), the court held that a cause of action under Section 504 was stated against the State of Tennessee by handicapped persons suing to block a change in the state's Medicaid program limiting the total number of reimbursable hospital days, on the ground that such a limuitation bore more harshly on handicapped persons. The Medicaid program, ofcourse, is a federally funded program. Under the proposed Bill a similar suit could be brought against the state in respect to any program decision, federally funded or not, so long as the governmental unit is in receipt of any federal funds.

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May 31, 1984

The Honorable Orrin G. Hatch
Committee on the Judiciary
The United States Senate
Washington, DC 20510

ATTENTION: MR. STEPHEN MARKMAN

Dear Senator Hatch:

RE: S. 2568

An argument made by several witnesses favoring S.2568 deserves further attention:

It was argued in favor of the position that S. 2568 merely restores the pre-Grove City state of play, that the new, operative "any recipient" language (substituting for the program-specific language) is based on regulations long in place under the four civil rights statutes. Since the regulations are old and familiar friends, we should therefore welcome this language as old friends too.

Although I believe this is an argument which can be and probably is made in good faith (and supports the good faith of the drafters of the Bill), it is nevertheless a fallacious argument.

The old regulation's language was intended to take the enforcement agencies' power to the limit of its legal authority. That legal authority is established and limited by the statute's program-specificity language as the statutory predicate for enforcement power. S. 2568 by rewording the program-specificity language in all four statutes removes that limit. By substituting in the statutes the regulations' "recipients" language the statutes themselves now would be extended to the limits of Congressional power--the spending clause and the Fourteenth Amendment. And that surely would be just the dramatic expansion of power which I and a number of witnesses warned you about.

In this connection the absence of cases instancing such extreme applications in the past is evidence of an administrative understanding that the statutes' program-specific language operated as some restraint. With that statutory language gone, the restraint would be gone as well.

Very truly yours,

Charles Fried
Carter Professor of
General Jurisprudence

CF:EA

Senator HATCH. Well, thank you. I have been interested in both of your statements, and I think you have raised some very, very interesting questions, both of you.

Let me ask you the same question I asked the previous panel.

Why is it worthwhile for us to worry so much about whether or not we are talking about genuinely private schools or private businesses or States or localities? Is not the issue here discrimination? Why should any entity be permitted to discriminate regardless of whether they are public or private, State or Federal? Have not all genuine advances in civil rights been accompanied by cries that private property rights were being violated or that principles of federalism were being breached?

We will start with you, Professor Fried, and then you, Professor Rabkin.

Mr. FRIED. Well, Senator Hatch, I am not sure that everyone in this room would agree with me, but if there were a statute which forbade me to discriminate intentionally against whom I took home to dinner, that would not trouble me. But that, of course, is not the situation we have.

You have been particularly alive to the distinction between effects and intent. If we were talking about prohibiting intentional discrimination, there would be no problem. But what has happened is that these statutes have been expanded through regulation and court decisions to cover the effects of discrimination, and the result of these amendments would be to greatly expand the coverage of effects test type protection to areas where it does not exist.

When we talked about intentional discrimination, we are talking about people who are acting in a way that we all consider obscene. Discriminating against people on the forbidden bases is an obscenity. However, when we talk about the effects test, what we are talking about is people who are pursuing a number of worthy goals, who are having to make difficult choices. And this is usually the case with State and local governments; they have to make difficult policy choices between worthy goals. And as they make these policy choices between worthy goals, they are subject to scrutiny, to criticism, and sometimes to liability because in making their choices and distributing their priorities, their priorities bear more harshly on some protected group though there is no discriminatory intent. There is a rather good example in a recent decision from the 11th circuit, lest I be accused of simply imagining horribles.

In the State of Georgia, the legislature ruled that there would be no more than 300 required schooldays within the school system. The Georgia Association for Retarded Citizens, a private group, brought a private suit claiming that this limitation of schooling to 300 days bore in a discriminatory way, although there was clearly no discriminatory intent, on retarded citizens who cannot learn as much in 300 days as nonretarded citizens. And the 11th circuit ruled that that was indeed the case and, therefore, the State of Georgia would have to lay on summer schools for retarded citizens while maintaining the 300-day limit for those who are not retarded.

This is a case where the State of Georgia had no intent to discriminate and was simply forced to reorder its priorities so as to devote more funds to a clearly worthy purpose, but obviously withdrawing those funds from other worthy purposes. That kind of choice is a choice which should be for the political process and not a choice which is compelled by private groups, private lawyers bringing imaginative suits in Federal courts and winning decisions such as was won in the 11th circuit.

Senator HATCH. Thank you.

Professor Rabkin.

Mr. RABKIN. Yes. I would give a somewhat different answer. I think the short answer to your question, why is it important to maintain distinctions between public and private, the short answer is to avoid spectacles like those we have been subjected to today. I mean maybe some people find it very edifying to have a lot of people march up and beat their breasts and say "I am opposed to discrimination too, I am really, really opposed." But I think it is demeaning and I do not want to live in a country in which people have to constantly beat their breasts and certify that, "Yes, I mean well toward everyone of God's creatures."

Now, if you transposed the context just a little bit, I think that some of the same people who now find this very edifying would find it disgusting. I mean if we required everyone to come marching forward and say: "Yes, I am a loyal American, I do love this country, I will never engage in treason, I have never done anything which was disloyal, and I would not associate with anyone who was disloyal."

Books have been written about the House UnAmerican Activities Committee and how terrible it was for us to make people parade in and abase themselves before the altar of loyalty and so on. I do not think it is at all an exaggeration to say that we are reaching a point now in which everyone has got to make a clean breast and say how they feel about everything and make sure that they live up to somebody's high standards for us. I think it is disgusting.

Second, let me say I quite disagree with Professor Fried when he says the forbidden bases of discrimination, anyone who discriminates on these forbidden bases, that is an obscenity. That is not an obscenity. I think it is ridiculous to say so.

What are these forbidden bases? Let us just remember this. Discrimination on the basis of handicap? It is certainly not nice to abuse people who have physical handicaps. On the other hand, what actually is meant by discrimination on the basis of handicap? I think that can cover such a range of things, I think it is ludicrous to say, well, if you do anything which might be construed as discrimination against the handicapped—for example, you just say sorry, on my athletic team we only want people in tip-top shape, and maybe that is discriminatory—then that is an "obscenity."

I am not trying to trivialize this. People have a different sense of how much accommodation you really are required to make to people's physical and mental infirmities. Again we should not be in a kind of a country in which people who do not measure up to somebody else's standards of how much accommodation is required are considered obscene, even with sex discrimination, I think that. You know, people, reasonable people disagree about what kinds of differences should be maintained between the sexes. Lots of very honorable people, very good citizens, fine fellows and ladies have differing opinions from feminist groups, and what most upsets me about this bill, and indeed about the trend in civil rights regulation, is we have a lot of people who have at the least a rather one-sided and, it often seems to me, a rather extreme and crazy view, but anyway a one-sided view and they insist now on controlling what everyone in this country does. In effect, they say "We will catch all of those who disagree and if they try and excuse themselves or get out of these regulations, we will at least make them stand up and beat their breasts and say but, yes, of course, in principle, I am as opposed to sex discrimination as you." I just do not think we need that kind of debasing ritual.

Senator **HATCH**. I did not quite interpret Professor Fried's comments in the same way you did. I agree with him, that there should be no intentional discrimination in our society.

Mr. **RABKIN**. Senator, would you say there should be no intentional discrimination in our society on the basis of age, and if you would say yes, I would respectfully ask you whatever you mean by that?

Senator **HATCH**. You have raised a good point. What is disparate treatment to some people may not be invidious discrimination. I think that one of the points you have made very well is that there are those in our society who would define almost any differences in treatment as discrimination; there are a lot of things that society as a whole would not find to be discriminatory which may fall within this bill.

But I was just trying to make clear that I understood also what Professor Fried was saying.

Let me just ask each of you to give me your opinion on this trickle down, trickle-up theory. Would this particular legislation would actually result in the application of the trickle-down, trickle-up theories.

Let us start with you, Professor Rabkin.

Mr. **RABKIN**. Yes. As I said at the outset of my testimony, I think the safe rule is to look for the most extreme interpretation possible then assume that civil rights groups will push the Government or the courts into adopting it. So since that is on the face of it a possible and even plausible interpretation of this statute, I would try and defend myself against that. I would not say, oh, well, the courts probably would not allow the agency to do that.

Again, one thing people have not given sufficient attention to is the message this is sending to the courts. I mean the Supreme Court made—whether you think it was ultimately good in its effects or bad in its effects—it made an interpretation in the *Grove City* decision which is certainly plausible and certainly reasonable, and the response from Congress was just outrage. And why was it outrage? Because it disappointed civil rights groups. And the message that is being sent to the courts is you must never, never, never cut back on the Federal regulations or even interpret them in a way which offends feminist groups and civil rights groups.

Now, that is a pretty powerful message, and if this bill is enacted it will be an embarrassment to the courts and it will be a slap in the face to the Supreme Court and they will get the message. So the most extreme interpretation which the enforcing agencies try to put forward is one which I think you cannot in the future count on courts to try to cut back.

Senator HATCH. A number of colleagues jumped right on as cosponsors on the basis that this is just a simple little overrule of the *Grove City* case. It is clearly a lot more than that.

Professor Fried, let us get your view on this.

Mr. FRIED. The way I would answer that, Senator, is to say that if I were trying to enact a trickle down, trickle up, trickle over test, I could not do better than the draftsmen of this bill. This is why I think the protestations of this being a little technical amendment are really just not candid.

Senator HATCH. I am sure this has been a very difficult hearing for some of the draftsmen who have been sitting in this hearing room today; I agree with you, though, that the bill is very ambiguous. I agree with Linda Chavez that there are all kinds of interpretations that could occur here, some of which are very drastic. I do think Congress has an obligation to make these things clear, make it clear what we really intend. But sometimes we write these bills in a purposely obfuscatory way so that the courts are able to interpret them in their discretion. That is not the way to be legislators. I think it is up to us to define these matters. You both agree with that statement that we ought to be more definitive, that we ought to be forth right, that we ought to do the things that are right. But be that as it may, this bill does not help us in any of those quests, it seems to me.

Could each of you compare and contrast the *Grove City* decision with last year's court decision in the *Bob Jones University* case? In particular, I might ask is there any cause for concern that the joinder of the theories in these two decisions may lead to even greater difficulties for private educational institutions in the future? Is there any concern that tax benefits and tax exemptions may eventually be considered to constitute "indirect assistance"?

Mr. FRIED. That view has been forcefully argued by my colleague, Professor Tribe, who has argued that tax exemptions constitute such an indirect form of Federal aid and the fifth amendment So that view is certainly present. We do not need to imagine it.

Senator HATCH. Professor Rabkin.

Mr. RABKIN. Yes. I think the decision is already rather extreme in its suggestion that indeed tax exemptions make you a recipient of Federal funding. One might say the saving grace was that the court laced its opinion with all kinds of references to *Brown* v. *Board* and other cases in the sacred canon, and it harped a lot on how terrible racial discrimination was. That might allow the inference that, well, this is only going to be applied to racial discrimination. And I will add here my own personal view is that if there is one thing our society may be justified in really reaching far down into private conduct to control, I think it might be race discrimination, because that has been so divisive and bitter in the past. The Supreme Court may make special exception there and really try to affect all kinds of private institutions, prevent them from continuing race discrimination even if there is no statute to forbid it.

What is disturbing about this bill is it tells the Supreme Court race is not unique at all, it is not the one thing that we should all be generally defensive about, concerned about, preoccupied about.

No. It is just one of innumberable number of things that people want to transform in private life.

Sex discrimination is just as important, and age discrimination and all the rest. That seems to me to invite the Supreme Court to turn around a few years from now and apply the *Bob Jones* precedent to a single sex school, which is private, receives no money, but happens to have a tax exemption. It is all laid out there and you do not have to cite—well, in this case you cannot cite Laurence Tribe, I should say my former teacher, who was prudent enough not to make this argument about sex discrimination in the hearings on this issue last year. But the Civil Rights Commission was imprudent enough to make this argument about sex discrimination and said in one of its reports from the 1970's that just as no tax exempt institution can be allowed to practice race discrimination, no tax-exempt school should be run on a single sex basis. All the elements of the argument are right in front of you, and I think this bill gives a further push because it emphasizes that sex discrimination is just like racial discrimination.

Senator HATCH. How do you interpret S. 2568 from the perspective of civil rights enforcement? Do you think there will be much overlap? Is it a serious problem or a mere detail that we can work out through some sort of executive directive or regulation?

Mr. FRIED. It seems to me to be a very serious problem because every funding agency will be required to assure compliance. The law directs that. They will be required to assure compliance, not only in the particular program which they fund but in all the other programs of the private or State or local institution which they fund, and that means that every institution is going to be subject to multiple requirements of reporting and to multiple compliance reviews.

I can imagine a way to tidy that up. It is quite possible the executive branch might centralize all that, but that might take a while. The thing that one has to realize is that civil rights legislation is on a ratchet, it moves in one direction only. That means this legislation if it is passed will be with us for 20 or 30 years to come, and that means that it will be with us through all kinds of administrations, administrations headed by Presidents that we have not yet even dreamed of. I do not think that we should just casually assume that those Presidents and their department heads will exercise what we here in this room would consider to be prudence and good common sense.

Finally, you must also consider the fact that even if the bureaucrats do have common sense, which sometimes they do, that these statutes all are open to private suits by private attorneys, what I would call civil rights bounty hunters who are now able to collect fees if they win and sometimes able to collect fees even if they do not win. And those private suits will be litigated not before bureaucrats who are subject to political controls, but before hundreds and thousands of Federal district judges, many of whom lack the common sense which the heads of agencies perhaps have, and if they do not have 4 years later, their successors will.

Senator HATCH. All right. Professor Rabkin.

Mr. RABKIN. Yes, Professor Fried reminds us that future Presidents that we cannot even imagine may not be very prudent in exercising their power over sanctions. Let me mention that future Presidents we can imagine very well because they are already out there advertising themselves for the job.

Senator HATCH. No one here in this room.

Mr. RABKIN. No one here in this room, but several candidates for that office have said that, "Yes, I will withhold Federal funding from any State that fails to ratify the ERA." I think that is mind-boggling. That is saying you vote the right way or otherwise I will use Federal money to punish you. And there was no outcry over that. And when Senator Glenn said, "no, I would not do that," he got in a lot of trouble with women's groups. Why would you not punish them? So people have the idea that, of course, Federal funding should be used as a club to bang anyone over the head who does not get into line.

The question is, Would this create administrative nightmares? I take it for granted. The history of civil rights enforcement has been that advocacy groups push every possible agency to do as much as it can and, you know, get into every little nook and cranny and crevice and try to exert some leverage

Over the last 15 years, we have had continual efforts by successive administrations to try and tidy things up, to try to coordinate, to try and prevent duplication, and so on. This was not only to save administrative resources but to spare private institutions or sometimes public, but anyway non-Federal institutions, the burden of having first people from the Labor Department come in and ask about their nondiscrimination in compliance with an Executive order program, and then people from EEOC come in and then HEW come in and ask the same thing. The idea was, "Let us be a little tidy and responsible."

In almost every case there was a big fuss from civil rights advocates in response. They do not like these programs being consolidated because, as I was told by David Tatel, it is good to have competition, to have the agencies going over the same terrain because it keeps everyone on their toes. And I have no doubt that it keeps the private institutions on their toes because they have to constantly respond to different agencies. I think there is a lot of overlap and trouble, and in the current climate I do not see how anyone could be confident that this will be handled in a very reasonable and prudent way.

Senator HATCH. Thank you.

Professor Fried, let me ask you this question. We heard a great deal of conceivable horror stories about this bill. You have given some here yourself today: Apartment buildings required to conform to section 504 because they receive bank loans; pharmacists covered by Federal regulations because they accepted medicare prescriptions; grocery stores covered because they receive food stamps from food stamp recipients.

In your judgment, are these genuinely serious prospects under the act or is there some measure of implicit limit to the application of this bill? Are there absolutely no conceptual limits implicit in this bill?

Mr. FRIED. Well, sir, I cited to you the *GARC* case, the *Georgia* case, which was not a figment of my imagination. That is a decision of the 11th Circuit Court of Appeals.

Senator **Hatch**. That is where they have a lot less than this legislative language to work with.

Mr. **Fried**. Yes. And there was the *Jennings* case, where it was held that the State of Tennessee, which, in an effort to keep down medical costs, the cost to it of medicaid, limited the number of hospital days which it will reimburse, and they were subject to suit. And that suit was upheld in the sixth circuit on the grounds that a limitation on reimbursed hospital days bears disproportionately on handicapped citizens. That is another example of the effects test being brought to bear against a State agency which is not seeking to discriminate against a protected group but which is just allocating its priorities among worthy groups in a way that one of the worthy groups does not agree with. And that, again, is not a figment of my imagination; that is a decision of the Sixth Circuit Court of Appeals. Once again that court was working with language which is much more restrictive than would be the case if this bill became law.

So I do not think that I am imagining horribles. I think I am giving you a necessary extension of what we have here, given the fact that the control of this will fall into the hands of the civil rights bounty hunters bringing private causes of action.

Senator **Hatch**. You are saying the only conceptual limits in this bill are those within the fertile minds of the most creative and innovative lawyers in our society?

Mr. **Fried**. And the common sense of the Federal judiciary and that is a commodity which is distributed most evenly.

Senator **Hatch**. Let me ask each of you one final question, and that relates to the value of legislative history.

To what extent is such legislative history a useful tool for dealing with the sort of concerns that you and others have raised about this legislation?

Let us start with you, Professor Rabkin.

Mr. **Rabkin**. Yes; I am glad you asked that question. I would like to reemphasize this point.

I think it is, judging by past experience, more or less of no value whatever. If you go back to the 1964 Civil Rights Act, look at the debates there, it is about as clear as can possibly be. Hubert Humphrey said over and over again, "what quotas? No; of course it will not be quotas. Statistical balance. No; of course it will not be that. Bussing? No; of course it will not be that." And all of his floor leaders for the different sections of the bill said "of course," it will not be any of these horrible things that these Southern bigots have dreamed up to frighten you with.

We all know what happened. Look at the *Weber* case in which, to quote Justice Renquist, the majority of the Court perform an escape act which would be envied by Houdini. They say there are a lot of things in the legislative history and it is complicated, and we think preferential quotas are good for black Americans and we feel that Congress would have wanted something that is good for black Americans, regardless of what the legislative history says. That is outrageous, but it has come to be accepted.

Let me say that your colleagues who think it is easy to overrule the Supreme Court did not think it was an easy matter to overrule the Supreme Court when people said, look, why do we not clarify the meaning of the Civil Rights Act regarding quotas? They usually did not come out and say, "I agree with everything that the Supreme Court has done in those cases." Instead we were told that it is important to defer to the courts and its experts, and they should be left to figure these things out.

I say again I really think one is simply handing this over to bureaucrats in the first instance and judges in the ultimate instance, and one has really no reason at all to expect that they will take seriously anything that you or I or anyone here says.

Senator HATCH. It seems to me as if the interpretative process of the proponents of this particular bill is that we initially look to the legislative history itself to explain the meaning of the bill and only if that is ambigious do we look to the text itself. This seems to me to be turning the process on its head.

Professor Fried.

Mr. FRIED. Senator, commentators such as myself and many others have been criticizing the judiciary for acting lawlessly, for arrogating power to themselves, for not respecting the limits of their office. And when I meet members of the judiciary on social occasions, on panels, in discussion groups, they all say to me, and I think with complete sincerity, that this is a bum rap, that they are doing the best they can with the defective product that is being handed to them by the Congress. They call attention, and I think they are justified in doing so, to the kind of legislation which they are handed. And they ask, what do you expect us to do with legislation which is poorly drafted, which is poorly thought. Surely this legislation is the result of a thoughtless process, which in a vague way points to a problem, then says let there be justice, and now let the judges take care of it. It is the kind of legislation which simply invites the degradation of the judiciary. And I do not think elaborate tomes of legislative history are any kind of a substitute for careful drafting.

Senator HATCH. Well, thank you.

Let me just ask you, Professor Fried, one other question.

Several major corporations around the United States provide accredited education programs for their employees. As I understand, some of these programs charge tuition which has been paid for by Federal education assistance.

Under S. 2568, could the Government regulate through the Department of Education the activities of every department or division of that corporation if an employee pays for his or her tuition costs at the corporation school with Federal aid?

Mr. FRIED. It would seem to me that that case is not even on the boundaries of this language. It is right square in the middle of the language and I need only recall to you Senator Kennedy's statement on the floor of the Senate to show that this is not on the borderline. This is the core of what this allegedly technical legislation does.

There is an analogous case which deserves to be focused on, and that is the tremendous restrictions that it would place on the banks, because as soon as a bank is a recipient of a Federal dollar, and most of them are in one form or another, then when they pass on those dollars in the form of loans, that would mean that their borrowers become subject to section 504 under an effects test.

I should think that the banks ought to be very worried about that interpretation.

Senator HATCH. Well, I want to thank both of you. I have enjoyed both of you testifying very much. And although both of you have been quite humorous in ways which has added to this process, you both have been very serious in your observations. I have a great deal of difficulty with anybody who indicates that this legislation is just an overrule of *Grove City,* to restore the concepts of title IX to what they were prior to that time.

Now, it may be that this bill is beyond what title IX intended to do or what the people who enacted title IX intended to enact. Now, that may be the way it should be. I do not know. My personal feeling is that you have raised some very, very important issues. Every witness here today has. It is not a simple matter. It is not some insignificant chance. It is a very, very sweeping change or rather set of changes in civil rights law in this country.

I do not think that the sponsors of these acts had any idea that at some time in the future we would have a bill like this that would be so sweepingly supported by Members of Congress—in the name of clarification—who had never even read the bill.

I agree with you, Professor Rabkin, you put the imprimatur of civil rights on something and everyone rolls over and says that must be good. That does not translate into reality. I think we have to scrutinize these things because everybody in this society is going to be affected, not just private educational institutions but everybody. This bill is very broadly drafted; it is sweeping; and beyond anything that I have seen in the area of civil rights in its pure scope since I have been in the Congress.

Mr. RABKIN. Just one quick point.

We were talking about the unreliability of legislative history. It occurs to me that everyone is talking about the original intent of these measures. One of these statutes that was debated at enough length to have the legislative history is title VI. If you go back to 1964, what the opponents of title VI were saying is precisely what we have been saying about this measure. They were saying this will be terrible because the State of Georgia will have all its Federal highway funds cut off if one of its school districts happens to be inadequately desegregated. And that is why this program specific language was put in, and though I cannot now quote it to you verbatim, you literally can find Senator Humphrey and Senator Pell in debate saying that funds will never be cut off in a wholesale or wide ranging manner. Title VI will be limited to particular programs, they insisted. And yet, 20 years later, when the Supreme Court—it seems to me more or less remained faithful to that—people in Congress are indignant and saying we have to restore the "original intent" which is something that we can make up now on the spot.

Senator HATCH. I want to thank both of you for being here. I would like to see you just for a second, Professor Fried, if you can stay around. I would like to see you right after this hearing.

We are going to finish with the last few witnesses. We appreciate both of you testifying.

Our last panel consists of Mr. William Taylor of the Center for National Policy Review; Ms. Marcia Greenberger, Women's Law

Center; and Mr. David Tatel, an attorney with Hogan & Hartson.

I want to apologize to each of you for this hearing going as long as it has, but it has been an interesting hearing. I apologize that you had to wait through a lunch hour and be here this late.

Why do we not start with you, Ms. Greenberger.

Ms. GREENBERGER. Mr. Tatel.

Senator HATCH. Mr Tatel. Go ahead, Mr. Tatel.

STATEMENTS OF PANEL CONSISTING OF DAVID S. TATEL, ESQ., HOGAN & HARTSON; MARCIA D. GREENBERGER, NATIONAL WOMEN'S LAW CENTER; AND WILLIAM L. TAYLOR, CENTER FOR NATIONAL POLICY REVIEW

Mr. TATEL. Mr. Chairman, my name is David Tatel. I served as Director of HEW's Office for Civil Rights from 1977 to 1979. During that period of time, OCR was responsible for enforcing title VI, title IX, section 504, and the Age Discrimination Act.

I appreciate this opportunity to be here today to share with the committee my views about S. 2568. I support the enactment of that legislation because it will restore the jurisdiction of title IX and the other Civil Rights Acts to what it was prior to the Supreme Court's decision in the *Grove City* case.

I have a written statement which, with your permission, Senator, I will simply submit for the record.

Senator HATCH. Without objection, we will place it in the record.

Mr. TATEL. HEW's interpretation of these statutes evolved in connection with title VI of the Civil Rights Act of 1964, the first of the statutes to be enacted by Congress. HEW interpreted section 601 of that act broadly to prohibit racial discrimination anywhere in an institution which received Federal financial assistance. That broad interpretation was based on the language of the statute, its legislative history, and the well accepted constitutional principle that Government steer clear from providing public funds to institutions which discriminate on the basis of race

Since title IX, section 504 and the ADA are based on title VI and contain virtually identical language, HEW extended this interpretation to these new statutes as well. They too were interpreted to prohibit discrimination anywhere in an institution which received Federal financial assistance.

Prior to the *Grove City* decision, HEW would have applied this interpretation to Grove City College essentially as follows: If it had received a complaint or if it decided to conduct a compliance review, it would have looked for discrimination on the basis of sex throughout the college, even though student aid was the only form of Federal assistance the college received. If it discovered discrimination in the college's computer sciences program, for example, the Department would have notified the college that it was operating in violation of title IX. If that violation could not be corrected voluntarily, the Department would have either referred the case to the Department of Justice which, of course, had the authority to file suit to correct the violation or it would have initiated fund termination proceedings during which the Department would have attempted to prove that discrimination existed in the computer sciences program and, if necessary, that the discrimination infected the student aid program.

Grove City would now prohibit the Department from challenging discrimination anywhere in the institution except that which occurs precisely in the student aid program. Since title VI, section 504 and the ADA contain virtually identical language, *Grove City* could also be interpreted to preclude the Department from challenging discrimination under those statutes unless it could first demonstrate that the discrimination occurred in the student aid program. If that demonstration could not be made, then *Grove City* could preclude the Department from proceeding any further even though discrimination might be rampant throughout the rest of the institution.

S. 2568 is needed, I believe, to restore the prior interpretation of these statutes to what it was before *Grove City*.

The opponents of S. 2568, as you heard this morning, argue that this is not correct and that, in fact, S. 2568 will greatly expand the jurisdiction of all four statutes beyond what it was prior to the *Grove City* decision. I have dealt with their arguments in detail in my written testimony and with the hypotheticals they have offered, and I think I have shown with respect to each one of them, Senator, that they are either wrong or that the hypothetical will not result in a change in the law. It is certainly true that the legislation has ambiguities in it, but all legislation has ambiguities. In this case, however, the difficult ambiguities are the ones that are inherent in the underlying legislation, title IX, title VI, and the other statutes.

The Government and the courts wrestled with those ambiguities for the past 20 years and did a fairly good job. Mistakes were corrected by the courts as one was in *Grove City*. That is the way the system works, and the way it will continue to work under S. 2568.

My point is that S. 2568, when you examine the analysis in my prepared testimony, does not expand the jurisdiction of the statutes beyond what they were prior to *Grove City*. Equally important, S. 2568 preserves the pinpoint provision of all four statutes. To put it simply, the law after S. 2568 will be the same as it was before *Grove City*.

There are several other problems which the *Grove City* decision will cause that can be corrected through the enactment of S. 2568. For one thing, *Grove City* will bring with it a bureaucratic nightmare. Every civil rights investigation will at the outset, require the Government and the recipient alike to hire teams of accountants to trace the flow of Federal funds and armies of lawyers to argue endlessly about what is and what is not a program or activity. The result will be an administrative process which is inefficient, expensive and ineffective.

Second, the *Grove City* decision will cause many people protected by title IX and the other Civil Rights Acts to abandon the administrative process altogether and turn instead to the more expensive, slower and less flexible Federal courts. The result will be contrary to one of Congress' purposes in enacting these statutes, the creation of a smooth and efficient administrative process for resolving civil rights violations.

Finally, Mr Chairman, title VI, title IX, section 504 and the ADA are not as one would gather from listening to the witnesses today evil or onerous statutes which should be restricted as much as possible. To the contrary, they represent one of our Nation's most fundamental principles, that institutions which receive public funds ought not discriminate Grove City permits them to do so and, for that reason, S. 2568 ought to be enacted.

Thank you very much.

Senator HATCH. Thank you, Mr. Tatel.

[The prepared statement of David S. Tatel follows:]

PREPARED STATEMENT OF DAVID S. TATEL

Mr. Chairman and Members of the Committee, my name is David S. Tatel. I served as Director of the Office for Civil Rights in the U.S. Department of Health, Education and Welfare from 1977 to 1979. At that time, the Office for Civil Rights was responsible for enforcing Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Those functions are now carried out by the Department of Health and Human Services and the Department of Education. I appreciate this opportunity to appear here this morning to share my views on S.2568, the Civil Rights Act of 1984.

I support the enactment of S.2568 because it will restore Title VI, Title IX, Section 504 and Age Discrimination Act jurisdiction to what it was prior to the Supreme Court's decision earlier this year in Grove City College v. Bell, 52 USLW 4283 (Feb. 28, 1984(. I also support the enactment of S.2568 to correct a number of serious problems which the Grove City decision will cause.

HEW's enforcement procedures regarding these important civil rights statutes evolved in connection with Title VI of the Civil Rights Act of 1964, the first of these statutes to be enacted by Congress. The Department interpreted Section 601 of the statute broadly to prohibit discrimination on the basis of race and national origin throughout any institution which was a recipient of federal financial assistance. This broad interpretation was grounded on the language of the statute, its legislative history and the well accepted constitutional principle that all levels of government steer clear from providing public revenues to institutions which discriminate on the basis of race or national origin. As a consequence, the statute was interpreted as permitting investigations of discrimination on the basis of race or national origin throughout the institution so long as any "program or activity" within it received federal financial assistance.

If an investigation revealed a violation of Section 601, OCR would enter into negotiations with the recipient in an effort to obtain voluntary compliance. If those efforts failed - and they rarely did - OCR would utilize one of the two sanctions set forth in Section 602. One sanction involves referral of the case to the Department of Justice which was authorized to file suit to require compliance with the broad prohibitions set forth in Section 601. The other sanction involves an administrative proceeding to terminate federal financial assistance. Those proceedings, however, are not as broad as Section 601. Funds can only be cut off if discrimination actually occurred in the federally funded "program or activity" or if the federal funds benefitted a non-federally funded "program or activity" where discrimination occurred. Funds could also be cut off if a federally funded "program or activity" is "infected" by proven discrimination elsewhere in the institution.

Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 were based on Title VI and in fact utilized virtually identical language. As a consequence, HEW applied Title VI enforcement procedures and standards to these newer statutes. They were thus interpreted to prohibit discrimination on the basis of sex, handicap or age anywhere in a covered institution having a "program or activity" receiving federal financial assistance.

Prior to the Grove City decision, the Department would have applied these standards to Grove City College. If the Department had received a complaint about the institution or elected on its own to conduct a compliance review, it would have determined whether sex discrimination existed anywhere in the institution even though student financial aid was the only assistance the school received. If sex discrimination was discovered in the school's computer sciences program, for example, the Department would have notified the institution that it was in violation of Title IX. If the matter could not be resolved voluntarily, the Department would have referred the case to the Department of Justice, or initiated fund termination proceedings in order to prove that discrimination had occurred in the computer sciences program and that the program benefitted from student aid, or if it did not, that the discrimination infected the federally financed student aid program.

The Supreme Court's Grove City decision limits the application of this broad administrative interpretation. Grove City now prohibits the Department from challenging any discrimination on the basis of sex at the College except that which occurs directly in the student aid program. Since Title VI, Section 504, and the Age Discrimination Act contain virtually identical language to Title IX, the Department could likewise be prohibited from challenging discrimination based on race, national origin, handicap or age unless it could first be established that the discrimination occurred in the particular federally funded "program or activity." If no such discrimination was found, the Department could be precluded from proceeding further even though discrimination might be rampant throughout the rest of the institution. S.2568 is necessary to restore the pre-Grove City interpretation of these important civil rights statutes.

The opponents of S.2568 claim that it would expand the coverage of Title IX and the other civil rights statutes beyond what it was prior to the Grove City decision. For example, testifying on May 22, before a joint committee hearing on the House side, Mr. William Bradford Reynolds, the Assistant

Attorney General in charge of the Civil Rights Division, made this claim about H.R. 5490, the House version of S.2568:

> "Simply to set the record straight, I would point out that the Court's 'programmatic' reading of Title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute -- one contemplating institution-wide coverage of Title IX -- the fact is that, before Grove City, every court of appeals except the Third Circuit in the Grove City case itself had construed Title IX to be program-specific in coverage. Indeed, as to the parallel Federal funding statutes dealing with race discrimination (Title VI of the Civil Rights Act of 1964) and with handicap discrimination (Section 504 of the Rehabilitation Act of 1973), they, too, had consistently been interpreted by the Federal appellate courts as program-specific."

(Reynolds' Testimony at pages 4-5.)

This implication that, with the exception of a few errant executive branch agencies, the civil rights statutes have always been interpreted as program-specific is flatly wrong. In fact, as I noted at the outset of my testimony, since 1964, when the first of the civil rights acts was passed, until 1980 when President Reagan took Office, every executive branch agency with civil rights responsibility interpreted the coverage of the statutes to be institution-wide and enforced them accordingly. With one exception, everyone of the cases Mr. Reynolds cites in support of his assertions were decided in 1980 or later, and led to the Supreme Court's Grove City decision. The exception is Board of Instruction v. Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969). That case, however, does not support Mr. Reynolds' claim that the courts interpreted Title VI to be program-specific. Indeed, the case did not even involve the scope of Section 601 of the statute. It held only that Section 602, the enforcement provision, prohibited HEW from terminating federal financial assistance unless that assistance funded the program or activity where the discrimination actually occurred or was infected by the discrimination. This so-called "pinpoint" provision was the law prior to the Grove City decision and it will remain the law under all four civil rights statutes if S.2568 is enacted.

Mr. Reynolds is thus incorrect when he asserts that the significant strides which have been made under Title IX and the other civil rights statutes "should properly be evaluated with the clear understanding that those strides were under a program-specific statute, understood as such and consistently so interpreted by the Federal courts." (Reynolds' Testimony at page 5.) Quite to the contrary, the progress under these statutes came between 1964 and 1980 during which time HEW and the other agencies with responsibility under these statutes considered their coverage to be institution-wide. It is highly unlikely that this progress will continue if the program-specific standard of the Grove City decision is not overturned by Congress.

The opponents of S.2568 rely on a series of hypotheticals to support their claim that the bill will expand civil rights jurisdiction beyond what it was prior to Grove City. As I indicate below, however, careful examination of these hypotheticals indicates that they are either wrong, misleading or irrelevant, and that the proper application of the hypotheticals demonstrates quite clearly that S.2568 will not expand the pre-Grove City law.

1. "At a minimum, it seems clear that the term 'recipient' is at least broad enough to insure coverage of an educational institution where federal funds are provided to one or more of its programs or activities, and thus the Supreme Court's programmatic interpretation of Title IX in Grove City would be overturned. It appears, however, that the definition of recipient would also reach all campuses of a multi-campus university (i.e., University of California) if any federal funds went to just one campus, or to students (through a Pell Grant) enrolled at only one college campus. Also, federal funds going to an undergraduate program would, under H.R. 5490, seemingly include all graduate programs within Title IX coverage, even though there was no

> federal financial assistance at the graduate level."

(Reynolds' Testimony at page 9.)

This hypothetical is completely misleading because it erroneously implies that S.2568 would change the pre-Grove City interpretation of Title IX and the other civil rights statutes. Prior to Grove City, all the statutes were interpreted to prohibit discrimination on one campus of a multi-campus system if federal funds went to just one campus. They were interpreted to prohibit discrimination in a non-federally funded graduate program if an undergraduate program received federal financial assistance. This is precisely how they would be interpreted under S.2568. S.2568 would neither broaden nor narrow the pre-Grove City interpretation of the statutes.

The hypothetical completely ignores the fact, however, that both before Grove City and under S.2568, the "pin-pointing" provisions of all four civil rights statutes would limit the ability of the government to terminate federal financial assistance. For example, federal funding to an undergraduate program could not be cut-off if discrimination were found in a non-federally funded graduate program unless the Department could prove that the federal funds actually benefitted the non-federally funded program or that the discrimination in the non-federally funded program infected the federally funded program or activity. If this could not be established and if the University were unwilling to correct the problem voluntarily, the matter could only be challenged further through a suit by the Department of Justice or by an individual claiming to be harmed by the discriminatory action.

2. "Less clear is the intended scope of coverage under H.R. 5490 with respect to a college or university's commercial property. Rental property occupied by students or faculty would seem to be covered. But, also within reach of the broad recipient definition could well be

> university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with educatin, so long as it can be maintained that the noneducational enterprise 'receives support' from the college or university that is in some aspect extended Federal financial assistance."

(Reynolds' Testimony at page 10.)

This hypothetical is as misleading as the first one. The analysis of these issues under S.2568 would be no different than it was prior to Grove City. The definition of "recipient" contained in S.2568 is taken from the pre-Grove City Regulations issued by HEW and is intended to overturn that portion of the Grove City decision which precludes the government from extending the anti-discrimination provisions of the civil rights statutes to non-federally funded programs or activities which benefit from federal financial assistance in other programs.

Under S.2568, universities would certainly be required to rent university-owned housing to faculty and students on a non-discriminatory basis. This is precisely how the law was interpreted prior to Grove City. I do not recall the commercial problem arising, but what is clear is that the answer to this hypothetical under S.2568 would be identical to what it would have been prior to Grove City.

Finally, like the first hypothetical, this one also omits completely any reference to the "pinpointing" provisions of S.2568. Like the pre-Grove City civil rights statutes, it too would prohibit the Department from terminating federal financial assistance unless it could first be shown that the assistance went directly to or benefitted a federally funded program or activity or that the federally funded program or activity was infected by the discriminatory conduct.

3. "Thus, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under H.R. 5490, apparently apply to the non-educational ven-

> tures of a university as well as to those associated with its educational activities."

(Reynolds' Testimony at page 10.)

This is certainly true, but it was equally true prior to Grove City. Section 504 of the Rehabilitation Act, which prohibits discrimination on the basis of handicap, is not limited to education institutions. It applies by its very terms to all federally funded programs.

Nor would S.2568 make any change in Title IX which is limited to prohibiting discrimination in education programs. Prior to Grove City, it was interpreted to apply to all of the activities of an education institution, whether or not educational in nature. The same would be true under S.2568. Likewise, prior to Grove City, Title IX was interpreted as applying only to the education activities of non-educational institutions (e.g., a prison). The same would be true under S.2568.

4. "Thus, if a federal agency extends federal assistance to a State university system, all other State departments or agencies -- whether or not they are educational or perform an education service -- would presumably be brought within the coverage of the four statutes because the State "receives support" from the Federal assistance to the university system. The clear contemplation appears to be that this 'trickle up' theory of coverage will permit -- indeed perhaps require -- Federal agencies to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

   For example, if a county water department receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, H.R. 5490 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the federal financial assistance can be said to give "support" to the county. Should EPA receive a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- e.g., the county's road maintenance -- under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area (it would fall within

> the province of the Department of Transportation)."

(Reynolds' Testimony at pages 10-11.)

This hypothetical is inaccurate. Prior to Grove City, none of the civil rights statutes were interpreted to cover an entire state merely because one unit of state government received federal financial assistance. Coverage of the statutes was limited to the unit which received federal financial assistance (e.g., the university system). The same would be true under S.2568. Likewise, a grant to the county water department from the EPA would not have subjected the non-federally funded road department to civil rights jurisdiction, and it would not under S.2568.

This hypothetical also completely ignores the extensive arrangements which exist between agencies to avoid overlapping jurisdiction and investigations by non-expert agencies. These arrangements work well prior to Grove City even though Title VI, Title IX, Section 504 and the Age Discrimination Act make no reference to them, there is nothing in S.2568 which would change this. These agreements would ensure that EPA, for example, would investigate only those kinds of agencies where its expertise is appropriate. Where it lacks the necessary expertise, the agreements would ensure that it would delegate its responsibility to other federal agencies having the appropriate expertise (e.g., the Department of Transportation in the above example).

> 5. "If the large entity receives Federal financial assistance, all subunits are swept within the coverage provisions -- whether funded or not and whether or not they 'receive support' from the funding. Thus, a federal block grant to the State for educational purposes would likely bring all political subdivisions of the State under the civil rights oversight responsibilities of the Federal government."

(Reynolds' Testimony at pages 11-12.)

This hypothetical is as misleading as the preceding one. Prior to Grove City and under S.2568, an education block grant to a state would not subject the entire state to civil rights jurisdiction. To the contrary, it would result in coverage of only the education department which actually received the grant and the education institutions to which the grants were redistributed. And again, the hypothetical completely ignores the fact that the pinpointing provisions of all four civil rights statutes are contained in S.2568.

> 6. "Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores thatparticipate in medicare/medicaid programs could also be 'recipients,' as could the 'transferee' of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate."

(Reynolds' Testimony page 12.)

This was the same argument that Grove City College made in its effort to persuade the court that student loans should not be considered federal financial assistance for purposes of Title IX coverage. The court clearly rejected that argument, and in doing so made it clear that its decision would in no way result in food stamp or social security payments triggering Title IX jurisdiction. The Court stated:

> "Grove City's attempt to analogize BEOG's to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately receive federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individual's eligibility for general

> assistance is not tied to attendance at an educational institution."

(52 USLW 4286, at n. 13.)

It is clear from the foregoing - and from a similar analysis which could be undertaken for other equally misleading or inaccurate hypotheticals used by the opponents of S.2568 - that the bill does not expand the scope of the four civil rights statutes beyond what it was before the Grove City decision. To the contrary, S.2568 will restore the institution-wide coverage of the statutes which prevailed prior to Grove City. Equally important, S.2568 will preserve the "pinpoint" provisions of all four statutes. In sum, if S.2568 is enacted into law, the administrative application of the statutes will be no broader or no narrower than they were prior to Grove City.

As I mentioned at the outset, in addition to restoring the previous interpretation of Title VI, Title IX, Section 504 and the Age Discrimination Act, S.2568 should be enacted to correct other problems caused by the Grove City decision. First, the Grove City decision creates a bureaucratic nightmare for the government and recipients of federal funds alike. Every civil rights investigation will require teams of accountants to trace the flow of federal funds and armies of lawyers to argue endlessly about what is or what is not a "program or activity." It will make the enforcement process cumbersome and expensive to all concerned, and will divert our attention away from the primary concern of both the government and the recipient, namely, elimination of discrimination on the basis of race, national origin, sex, handicap and age.

Second, the Grove City decision totally ignores the fact that receipt of federal financial assistance for one "program or activity" may well free-up non-federal funds to be used in other programs or acitivities in the same institution. There is absolutely no reason why a person who is discriminated against in the latter program - that is, the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution - should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance.

Third, the Grove City decision, by sharply narrowing Title IX may cause many people protected by Title IX and the other civil rights statutes to abandon the administrative process upon which those statutes largely depend. This would force many more cases into the courts which are more cumbersome, more expensive and less flexible than the administrative process. This result would be contrary to one of Congress' objectives when it enacted these statutes: the creation of a smooth and efficient process for remedying civil rights violations.

Finally, and perhaps most important, the Grove City decision is directly contrary to the very purpose of these important civil rights statutes. It makes absolutely no sense to narrow these statutes as the Court has done. They do not, after all, impose onerous or burdensome requirements which should be restricted as much as possible. Rather, they reflect one of our nation's most fundamental principles, namely, that institutions which benefit from public funds ought not discriminate on the basis of race, national origin, sex, handicap or age. The Grove City decision permits them to do so, and for that reason it should be overturned by the enactment of S.2568.

In conclusion, it is important to remember that Title VI, Title IX and Section 504 have been responsible for bringing about fundamental changes of enormous importance. Schools have been desegregated; non- and limited English speaking students are gaining equal educational opportunities previously denied to them for many years; and hundreds of thousands of handicapped people are being brought into the mainstream of American life. But the job is not yet done, and Title VI, Title IX, Section 504 and the Age Discrimination Act have a critical role to play in the future. The Grove City decision threatens the effectiveness of these statutes and should be overturned through the enactment of S.2568.

Thank you very much.

STATEMENT OF MARCIA D. GREENBERGER

Ms. GREENBERGER. Thank you.

Mr. Chairman, I am Marcia Greenberger, an attorney with the National Women's Law Center, and I am pleased to be here today to urge the quick passage of this legislation.

The Supreme Court's acceptance of the narrow interpretation of the scope and coverage of title IX in the *Grove City College* case seriously impairs the law's effectiveness as a tool to end sex discrimination in education. Given the fact that title IX is the only Federal law which protects both students and employees in education, its weakening is particularly serious.

In my written remarks, I discussed many aspects of education where title IX has made a real contribution toward sex equity. Senator Hatch, as you mentioned, having heard from women in Utah, you know yourself that that in fact is true.

I particularly noted a comment made by one of the college presidents who testified this morning. He said that he was told by the passage of title VI that race discrimination was illegal. And when he was told by title VI that that was the case, he made sure that his institution followed that principle of nondiscrimination on the basis of race.

What we are talking about today is exactly that point, that institutions must be told by the law, whether it is title VI, title IX, section 504 or the Age Discrimination Act that these bases of discrimination are illegal. That is precisely what we are about.

Senator Bayh, in discussing title IX before it was passed, stated that he doubted that there was any educational institution in this country that would not be covered by title IX because of the receipt of Federal financial assistance. Clearly he was talking about the receipt of Federal student aid. I did at this point want to address for a moment, Senator Hatch, your comments that you made earlier about considering an amendment to exclude from coverage, and I was not sure whether you meant just title IX or all the laws at issue in this legislation, institutions that only received student financial assistance.

Several years ago, in the context of guaranteed student loans, the Department of Education provided a list of well over 200 schools in this country that only receive guaranteed student loans, not counting other forms of Federal financial assistance. That list included many vocational education training programs that are at the heart of what title IX is all about. They are the educational institutions that give women a chance to further their education, to broaden their horizons, to open the job opportunities that have been previously denied them, to give them the education to be able to support themselves and their families. They are the kinds of schools that the women in Utah have been talking to you about

By excluding those hundreds——

Senator HATCH. You know how to get to me, Marcia, because, as you know, I have added $100 million to the vocational education bill to assist women in vocational education.

Ms. GREENBERGER. Well, many of these are vocational schools—and I would be happy to submit for the record the list that the Department had provided 2 years ago. I do not have an up-to-date list, and I understand that the list may well be longer now than it had been 2 years ago. But there are hundreds of schools across the country where student aid is the only form of Federal aid, and many of them are the vocational education schools. To exempt them from title IX coverage as you suggest would be a terrible setback, since title IX is the only Federal law that we have that prohibits sex discrimination in those schools. By exempting them, we give women no protection at all against sex discrimination in access to those programs.

Senator HATCH. I will certainly consider that along with other points of view.

Ms. GREENBERGER. Thank you.

I did want to talk a bit too about what I heard this morning that reflected a very fundamental misunderstanding about title IX and what it requires, perhaps that is attributable to the fact that some of the witnesses have assumed in the past that their institutions were not covered by title IX and have had little practical experience with its requirements. But there was really, as I say, a fundamental lack of understanding of what title IX requires.

It does not require a monolithic education. In fact, there are exemptions for curriculum altogether in title IX. It does not mean that a school cannot talk about marriage as well as paid work, although I would hope that if a school did discuss marriage, it would point out to its students, both male and female, how terribly unfair the laws are in this country to women who have devoted their lives to homemaking and to raising a family. It does not mean integrated dormitories. The regulations are explicit on that point. It does not mean that schools have to be integrated. There is an express exemption in the statutes that provides for single sex institutions.

Title IX is not dealing with matters of etiquette. Mr. Rabkin stated that, in his view, he thought title IX was dealing with etiquette, and I know, Senator Hatch, from the women in Utah, as well as the rest of the country, that you know and Members of Congress know that that is simply not the case. And when witnesses came before you this morning and said that the *Grove City College* case was a proper title IX interpretation, and that it was reasonable to simply limit title IX coverage to financial aid and allow the rest of an institution to discriminate, that Members of Congress will not view that as reasonable as millions of Americans across the country do not view that result as a reasonable just interpretation of the law women fought so hard to achieve in 1972.

Title IX has done much, but much remains to be done. And in my written testimony starting on pages 4 and 5, there are charts that deal with patterns of enrollment in vocational education and show—although progress has been made, to be sure—how seriously narrowed the job training opportunities are for women. And it is title IX alone which provides the Federal law which gives women the opportunity, and young women in this country the opportunity to open those barriers up and to secure that kind of job training. There is an enormous amount of work left to be done, as these figures so clearly indicate, and without title IX we have no Federal governmental statement that women must have this fair chance as a matter of their right under the law.

I want to talk for a moment about why groups like mine and other organizations around the country, in addition to many individuals, women around the country have reacted with such alarm to the *Grove City* decision and have urged the Congress to respond promptly. We see very clearly that the enforcement efforts by the Government are being narrowed dramatically after the *Grove City College* decision.

I attached to my written testimony several letters issued by the Office for Civil Rights to institutions who receive Federal financial assistance, stating that they are no longer going to proceed with claims alleging discrimination because they no longer think they have jurisdiction after the *Grove City College* case. This includes institutions who have been found to discriminate. The current findings of discrimination demonstrate that there are institutions who will discriminate. We always rely, of course, with respect to any law in this country, on voluntary compliance with the law, and we certainly assume good faith of our institutions. But that does not mean that every institution is free from discrimination. And it is essential that the law covers those institutions and prohibits that discrimination from taking place.

We now have schools who have been found by this Office for Civil Rights to have discriminated on the basis of sex against female students who are now being told by that very same Office for Civil Rights that they are no longer going to proceed and they are no longer going to require that institution to remedy the discrimination. The institution can continue to receive millions of dollars in Federal funds but allow the discrimination to continue.

In fact, I noted with some irony that the president of the American Association of Presidents of Independent Colleges and Universities testified this morning that he felt very clearly his institution did not discriminate, but I know one institution which is a member of his association and which is listed in his testimony had a complaint filed against it with the Office for Civil Rights, and was one of those institutions which has now been put on hold, if not dismissed, after the *Grove City College* decision has come down. So we are talking very much about institutions that this Government has found to discriminate.

Senator Hatch. I do not think he said that nobody discriminated or was accused of discrimination.

Ms. Greenberger. Well, I recall that he referred to the spirit of nondiscrimination that he thought the members were adhering to, and I wanted to point out for the record that one of the member schools that was listed in his testimony in fact was one of those schools involved with a complaint being dropped after *Grove City*.

Senator Hatch. The complaint has been put in abeyance?

Ms. Greenberger. Put in abeyance after the *Grove City* decision came down.

I did want to turn for a moment, as well, to some of the charges that this bill does not restore the laws to their former strength, but rather is an expansion of the law.

I want to state my view firmly that that is simply not the case and that in fact there is a serious misunderstanding and lack of information about what the law has required in the past. In particular, I wanted to speak for a moment or two about the way the education limitation in title IX is applied. First, sex discrimination is prohibited under title IX only with respect to education. Title VI, section 504 and the Age Discrimination Act prohibit discrimination in all activities receiving Federal financial assistance whether they are education related or not.

Women in this country have not secured that same broad-based coverage under our laws, but we do at least have title IX, wounded as it is now after *Grove City College*. So, living within that limitation of education, that education limitation has been applied in cases and in regulations since title IX was passed precisely as it has been described in the introductory statements and in the letters referred to by the chief sponsor of this legislation.

An educational entity has been deemed to be covered in its entirety if it receives Federal financial assistance. The Department of Agriculture regulations for instance, at 7 CFR 15a.2(q), state expressly that educational institutions are covered in their entirety. Under this approach, we have not had to debate with schools whether each of their activities is "educational," and whether, for example, they view intercollegiate athletics as educational or not. That has never been a relevant inquiry before.

On the other hand, since title IX does not apply only to schools, it has also been recognized that prisons, museums and other entities that are not schools but which carry on educational activities must comply with title IX's nondiscrimination mandate. There are cases that have held just that *Canterino* v. *Wilson, Rover* v. *Johnson,* and *Piasec* v. *The Cleveland Museum of Art* are three such cases. Therefore, when you have been told in testimony today that this law represents a dramatic expansion covering all educational institutions and educational activities in prisons and the like, and that that is an expansion beyond what the law required in the past, you have been told something in testimony that is simply not true.

Further, I wanted to address the actual words used in this legislation, since that has been made a subject of testimony that we have heard as well. The regulations under all of these statutes have used the word "recipient" and defined the word "recipient." The *Grove City College* Supreme Court case relied upon the title IX court's attention, of the rights of these women that we represent who are asking that their claims of discrimination be heard.

Senator HATCH. Which institution is that?

Ms. GREENBERGER. This is Temple University, *Hafer* v. *Temple University*. In the third circuit.

Senator HATCH. In Pennsylvania?

Ms. GREENBERGER. Yes.

Senator HATCH. It was before the third circuit?

Ms. GREENBERGER. Yes.

Well, there was a decision in the third circuit that the school was covered, that the program was covered.

Senator HATCH. But when the *Grove City* case came down——

Ms. GREENBERGER. Now, the university has raised the issue again. After the third circuit decision, they said that they would not contest coverage any longer and that they would be willing to turn to the merits of the case. And they are now saying that the coverage issue is up in the air all over again and asking that it be litigated all over again.

For those of us who do——

Senator HATCH. Is this just an isolated incidence or are you saying that the whole university is practicing widespread discrimination? What is involved there?

Ms. GREENBERGER. That particular case is——

Senator HATCH. Apparently they feel very strongly about it and you feel very strongly as well?

Ms. GREENBERGER. Well, they certainly would have to speak for themselves about how strongly they feel about it. The president of the university did make a statement after the third circuit decision came down that he would no longer contest coverage and he would be willing to turn to the merits of whether the program at issue, and this is an intercollegiate athletic program, discriminated on the basis of sex. After *Grove City* came down, they said that changes the whole state of the law and, as a result, they now want to raise the issue over again.

We see that all over the country. We know, with respect to the Department of Education, that what used to be assumed to be covered is no longer necessarily so assumed. We are waiting to hear what the Department of Education is going to decide. Which parts of schools are covered and which parts are not, and certainly litigation over what *Grove City College* means will continue into the future with respect to its application to title IX and other sorts of funding beyond student assistance, as well as to the other statutes.

So the notion that we now have clarity and certainty in the law is absolutely not true. The *Grove City College* case left many issues unresolved and left up in the air many questions about coverage which will be litigated. There is no question that this legislation could clarify matters rather than muddy them. And with respect to agency overlap, in fact, all of the agencies giving education moneys have currently been assumed to have title IX enforcement responsibility. Many have issued title IX regulations, not all have.

The Executive Order 12250 issued by the Department of Justice is a recognition of the fact that there are many different agencies with civil rights jurisdiction. They recently promulgated an executive order sending individual employment discrimination comregulation definition of the word "recipient" to find that Grove City College was a recipient and to distinguish the student aid funds at issue from other sorts of Federal funding, such as Social Security benefits, welfare benefits, food stamps, and the like. The choice of the word recipient in this legislation is, in fact, the best choice to assure that there is some continuity. It is not a brand new word dreamed up, we have a history of how it has been applied; we have a series of agency administrative interpretations; and we have the Supreme Court decision which has adopted and applied the definition of recipient.

So, the choice of that word, in fact, is one of the best ways of assuring that Congress has some control over the way it will be interpreted in the future. By defining it in the statute as well, and drawing the definition of recipient from the different definitions that exist under each of the statutes, Congress has a second opportunity of assuring that its intent will be followed in the future.

Moreover, the change in the fund termination is also wise. Here there was not a specific regulatory word that could be adopted easily, as was the case for "recipient." Therefore, the legislation draws from the lead case that deals with pinpointing, *Taylor County* v. *Finch,* choosing words that have been used in that case and applied by agencies ever since. That, in fact, seems to me to be the most responsible way of Congress making clear what its intent is, choosing language that has, in fact, been interpreted in the past. Congress then has the opportunity to clarify the language even further in legislative history.

I did not hear anyone in their discussion of their assertions that this law is an expansion, or these words would lead to an expansion, point to cases that support that charge or specific words that support that charge, that do not exist under the current laws.

My concluding point deals with the claims that litigation will be expanded and that we will be left with an agency morass. In fact, as one who has been involved in litigation under title IX, I think what we have right now, if this legislation does not pass, is an assurance of years of uncertainty and litigation. I am involved at the moment with litigation against an institution where students have claimed that they have been discriminated against on the basis of sex. Because the institution claimed that the particular program involved did not receive direct earmarked funds, we were involved in 3 years of litigation, tracing through all the Federal money that that institution got, deposing the Controller, securing exactly that sort of information now that every agency administrator, as Mr. Tatel said, must secure before they can decide which part of an entity is covered and which part is not.

After we showed the millions of dollars of Federal money that was involved, after 3 years of litigation, after the school lost its claims in the district court and in the court of appeals, the school said it was ready to turn to the issue of whether it discriminated or not. After the *Grove City College* decision came down, the school said, well, maybe not. Now we want to litigate all over again what Grove City College means in our case. We do not want to turn to whether we are discriminating or not, we are going to fight for another 3 years over what *Grove City College* case means under our facts and circumstances. What an enormous waste of time, of the plaints coming under all of those laws over to the EEOC for handling. There has always been agency overlap. It is perfectly within the power of the Federal Government to coordinate that overlap, and that remains the case now.

Thank you.

Senator HATCH. Thank you.

Mr. Taylor, do you know how much longer you are going to be?

Mr. TAYLOR. It depends on your questioning, sir.

Senator HATCH. I have two questions I would like to ask all of you.

Mr. TAYLOR. I can be about 5 minutes.

Senator HATCH. If you can.

Do you have a written statement?

Mr. TAYLOR. I have an outline that I submitted.

Senator HATCH. I will be happy to keep the record open for you to submit a written statement.

Let us just turn the time over to you and then I have just two questions I would like to ask the panel. Go ahead.

[The following was received for the record:]

PREPARED STATEMENT OF MARCIA D. GREENBERGER

Mr. Chairman and members of the Committee, I am Marcia Greenberger, an attorney with the National Women's Law Center. I am pleased to be here today to urge the quick passage of S. 2568. This legislation is needed to assure that we have strong laws prohibiting discrimination on the basis of race, national origin, sex, disability and age. However, because I have worked particularly in the area of sex discrimination, my testimony will be directed toward the Title IX aspects of the bill. Nonetheless, I do want to note that women face discrimination not only because of their gender, but also on the basis of race, national origin, disability and age. Given the overlapping nature of discrimination, and the similarity of approach of the statutes, all aspects of this bill are of critical importance and are properly addressed together.

In 1972, Rep. Patsy Mink summed up the compelling need for Title IX. Her words are as true today as they were 12 years ago:

> "Any college or university which has [a] . . . policy which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access."
> 118 Cong. Rec. 5806-5870 (1972)

Since 1972, we have worked on issues of sex equity in education, with a particular emphasis on Title IX to assure fair treatment of women and girls. I have been co-counsel for parties or represented *amici curiae* in many of the Title IX cases which have been brought in the courts. In particular, I was co-counsel representing the American Association for University Women (AAUW), *et al.* in the *Grove City College v. Bell* case in the Third Circuit Court of Appeals and in the Supreme Court. In fact, the Third Circuit opinion cited to and relied upon the brief filed by AAUW in support of its holding that student aid brought the entire school within the scope of Title IX.

The Supreme Court's reversal of the Third Circuit's holding on this point, and the Supreme Court's acceptance of a narrower interpretation of the scope and coverage of Title IX, seriously impair the law's effectiveness as a tool to end sex discrimination in education. Given the fact that Title IX is the only federal law which protects both students and employees in education, its weakening is particularly serious.

Title IX Has Made Important Headway in Combating Sex Discrimination in Education, But Much Discrimination Remains

Title IX has made a real contribution towards sex equity in education. I remember when I first began to work on these issues I was asked to review the Strong Vocational Interest Blank test, which was in use around the country to assist in counseling students as to future careers. At that time, the girls were given pink sheets asking their interests in a limited set of careers stereotyped as "women's jobs." I remember in particular a question on whether the girl taking the test would want to be wife of the President of the United States. I wondered then how one prepared for that career if the answer was yes. The boys were given blue sheets, where higher paying jobs were suggested. The question they were asked was whether they wanted to be President. With the passage of Title IX, the separate tests were eliminated. Our girls must now be given career options which are as broad and as varied as those presented to our boys.

Title IX has meant many other important things as well. It has opened up scholarships, particularly in the area of athletics, so that young women have a chance to secure a higher education through their athletic ability. It has provided an awareness of the problem of sexual harassment in schools, and a mechanism for dealing with the problem. It has opened the door of many graduate professional programs such as law and medicine to women.

But much remains to be done. For example, we still see enormous disparities between the vocationl opportunities given to young men and women. Vocational education enrollment remains highly sex-segregated and sex-stereotyped, mirroring the employment patterns in the workforce. In 1980, within federally-funded vocational programs women were concentrated in traditionally female course areas of home economics, health, office occupations, and consumer and homemaking programs; men dominated agricultural, technical, trade and industrial programs. League of Women Voters Education Fund, Achieving Sex Equity in Vocational Education 4 (1982). Recent progress in enrolling women in a more varied range of options has been most evident in those areas which are least sex-stereotyped as male or female, or which are considered male domains but viewed as "light" and "clean" work -- graphic arts, applied design and electronic accounting. Id. at 13.

The following chart from the report of the National Advisory Council on Women's Education Programs, Increasing Sex Equity 1980 Update 6 (1982), summarizes the enrollment patterns of women in vocational education programs in recent years:

Women Enrolled in Nontraditional, Mixed, and Traditional*/ Vocational Programs by Occupational Training Area and Year, United States

	1972	1976	1978	1980
	(percent)			
Nontraditional: Total	5.4	8.8	11.1	12.5
Trade and Industry	5.4	7.8	9.5	10.2
Agriculture	3.9	9.6	13.1	16.6
Distributive Education	14.6	23.4	16.7	17.2
Technical	8.6	12.2	16.7	19.0
Mixed: Total	50.5	51.8	55.7	59.0

(Continued)

Women Enrolled in Nontraditional, Mixed, and Traditional*/ Vocational Programs by Occupational Training Area and Year, United States--Continued

	1972	1976	1978	1980
	(percent)			
Trade and Industry	40.6	38.0	46.7	53.0
Agriculture	26.9	40.5	45.0	44.6
Distributive Education	46.3	48.7	52.2	55.9
Health	63.2	56.1	57.7	69.8
Business	56.8	57.1	60.5	61.5
Technical	31.8	46.6	46.2	51.5
Traditional: Total	86.7	85.8	85.7	86.7
Trade and Industry	87.1	85.1	86.2	89.6
Health	90.9	89.2	89.3	91.6
Home Economics	86.1	84.7	82.5	80.7
Business	86.0	85.4	85.6	86.3

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*/ Definitions of nontraditional, mixed, and traditional programs are based on the percentage of women enrolled in vocational education courses nationally in 1972. Nontraditional programs are those in which the enrollment of women in 1972 was 0.0 to 25%. Mixed programs are those in which the enrollment nof women in 1972 was 25.1% to 75.0%. Traditional programs are those in which the enrollment of women in 1972 was 75.1% to 100%.

SOURCE: Based on 1972-1978 data from U.S. Department of Health, Education, and Welfare, Bureau of Occupational and Adult Education (BOAE); 1980 data from U.S. Education Department, National Center for Education Statistics, Vocational Education Data System (VEDS).

The least progress has been seen in the buiding trade areas -- for example masonry, electricity and plumbing -- in which few women enroll, and fewer yet complete the program. Id. at 14.

As of 1980, enrollment of women in none of the following thirteen categories exceeded five percent:

Program	Percent
Air Conditioning	2.7
Body and Fender Repair	3.0
Auto Mechanics	4.6
Carpentry	4.5

Program	Percent
Masonry	2.3
Plumbing and Pipefitting	2.7
Diesel Mechanics	2.3
Electrical Occupations	3.9
Sheet Metal Occupations	3.7
Tool and Die	4.2
Other Metalworking	4.7
Fire Fighter Training	4.8
Small Engine Repair	4.0

Increasing Sex Equity 1980 Update, supra, at 7.

We see wide gaps in the athletic scholarships given to men and women, and in fact one recent study shows a gap in general student aid going to women and men.*/ We see little progress in employment of women in education in the better paying jobs and higher ranks. Title IX is needed as much as ever, not only to retain the gains we have made, but to secure continued progress that women in this country deserve.

The Grove City Decision Seriously Narrows Title IX's Effectiveness, Both With Respect to Coverage and Enforcement

Under the Grove City case, the receipt of federal student aid was considered to cover only the college's financial aid program. Therefore, Grove City College is free to discriminate against students in its math or science program, yet so long as the financial aid program is not discriminatory the federal student dollars can flow with impunity to its general fund, supporting all of the college's activities including its math and science departments.

The effects of this narrowing are beginning to be felt. The Department of Education has begun to close complaints and narrow interpretations, even where discrimination has been found, on the grounds that in its view after the Grove City decision Title IX no longer prohibits the discrimination. Copies of some of the Department of Education letters are attached to my statement. They are a graphic demonstration of the loss of protection women and girls have suffered when Grove City College was decided.

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*/ Moran, Mary, Student Financial Assistance: Next Steps to Improving Education and Economic Opportunity for Women, soon to be available from ERIC Clearinghouse on Higher Education and from the Association for the Study of Higher Education, Washington, D.C.

S. 2568 Restores the Law to Its Former Strength

S. 2568 puts the four civil rights laws back to where they were before Grove City was decided. It does nothing more and nothing less.

By requiring "recipients" of federal funds to comply with the nondiscrimination provisions, the bill assures that when an entity receives federal funds, it must not discriminate in any of its parts. The bill then adds a definition of "recipient" drawn from current regulations, and followed in the first part of the Grove City decision. Through these changes, the bill will eliminate the possibility of further confusion. The definition of recipient makes clear that an institution like Grove City is covered in its entirety.

The approach of covering the entire institution is clearly consistent with what Congress intended when passing Title IX. When Title IX was pending, Representative Green explained:

> "The purpose of title [IX] is to end discrimination in all institutions of higher education. Yes, across the board. . . ." 117 Cong. Rec. 39256 (1971)

And it was only with such across the board coverage that Title IX could be the "strong and comprehensive measure" Senator Bayh described and clearly intended the law to be. 118 Cong. Rec. 5804 (1972)

Moreover, by modeling Title IX after Title VI of the 1964 Civil Rights Act, Congress adopted and approved a statutory scheme which had been interpreted to be strong, providing across-the-board coverage. Not only agency regulations and enforcement, but case law decided before Title IX was passed confirmed this broad approach under Section 601 of Title VI. See e.g. United

States v. Jefferson Co. Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, Cert denied sub nom Caddo Parish Board of Education v. United States, 389 U.S. 840 (1967); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967); Board of Public Instruction of Taylor Co. v. Finch, 414 F.2d 1068 (5th Cir. 1969).

The enforcement sections of Title VI and IX (Sections 602 and 902) were also designed with care. Government agencies providing federal funds are obligated to provide an enforcement scheme which includes fund termination in the event that efforts to conciliate fail, or referral to the Justice Department for a court suit to secure the end of the discrimination. Where fund termination is used, the government is obligated to "pinpoint" the funds terminated. The "pinpoint" obligation was defined in Taylor County v. Finch, supra, decided under Title VI before Title XI was passed. Under Taylor County, funds could be terminated if those funds "support" the discrimination. That test of support is now maintained by this bill.

Moreover, since Title IX was passed, Congress has consistently refused to narrow its scope. As was true for Title VI, HEW promulgated regulations tracing the Title VI approach and broadly interpreting the scope of Title IX. See 34 C.F.R. Part 106. The regulations were approved by the President and sent to Congress for review.*/

Congressman O'Hara held six days of hearings on the Title IX regulations. He described the hearings as designed to determine

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*/ Pursuant to the General Education Provisions Act, 20 U.S.C. §1232, Title IX regulations could not become effective until Congress has had 45 days to review the regulations and to reject them. Although the statute was later amended to provide that failure to disapprove regulations did not constitute a finding of consistency with the underlying legislation, see 20 U.S.C. §1232(d), the regulations were finalized before the law was so amended.

"whether or not the regulations as they are written are consistent with the law, or whether they should be returned to the agency for redrafting until they are consistent with the law from which they must draw their authority." Hearings on Title IX Before the Subcommittee on Postsecondary Education of the House, Committee on Education and Labor, 94th Cong., 1st Sess. 97 (1975). Proposed concurrent resolutions that would have disapproved the regulations were not approved by either House of Congress.

Congress has also consistently refused to approve express efforts to limit the coverage of Title IX to programs and activities directly receiving federal funds. One such effort was an amendment introduced by Senator Helms in 1975. He explained:

> ["t]he bill provides that Title IX shall apply only to education programs and activities which directly receive federal financial assistance....

122 Cong. Rec. 23846 (1975) (emphasis supplied). Senator Helms' bill was not passed.

Given these overwhelming indications of Congress' intent to create a broad-reaching statute, one might well ask how a majority of the Supreme Court decided Grove City as it did. In fact, it is important to keep in mind that this information was never presented to the Court by either party in the case. The two opposing parties were Grove City College and the government. Once the government switched its position in the Supreme Court, neither side supported the view that institution-wide coverage was intended by Title IX. Moreover, the government refused to support a petition to the Court that third parties be given time to present arguments in favor of institution-wide coverage to the Supreme Court. Therefore, the Court decided this most critical of issues without hearing from anyone who supported the original long-standing position of the government.

Prompt Action Is Needed

It is important that this bill move quickly, to clarify that indeed broad coverage and effective enforcement is required. We have seen the Department of Education begin to close cases and narrow its efforts. Federal dollars will now be flowing to institutions which even the Department of Education has found to discriminate. Moreover, the amounts of federal dollars at issue are enormous. When Title IX was promulgated, the House Report listed many categories of federal financial assistance covered by the statute. H.R. Rep. No. 5544, 92nd Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Admin. News 2462. From Basic Education Opportunity Grants to Graranteed Student Loans to construction monies to myriad grant and contract programs, the list was long. All of these categories still exist, and many new funding programs have been added.*/

That billions of dollars could be used to support discrimination is simply unacceptable. The rights of women, minorities, disabled persons and older Americans depend on Congress' speedy action to correct this terrible wrong.

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*/ The District Court in Grove City College held that Guaranteed Student Loans are federal financial aid to schools but are not federal financial assistance subject to government enforcement under Title IX on the grounds that they fit within the statutory exception of contracts of insurance or guaranty. Because the GSL program provides a substantial interest subsidy as well as special allowance payments in addition to the guaranty, all past administrations correctly took the position that the GSL program goes beyond the exemption and is included. However, the Justice Department dropped the appeal on this issue originally taken by the government, so that the Grove City College case ultimately dealt only with Basic Education Opportunity Grants. See Hearings Before the Committee on Education and Labor, Subcommittee on Postsecondary Education, House of Representatives concerning Guaranteed Student Loans on May 13, 1982.

AUG 1 0 1983

Dr. Wilford S. Bailey
Acting President
Auburn University
Auburn, Alabama 36849

Dear Dr. Bailey:

Re: Docket Number 04-81-2005

By a letter dated July 2, 1981, the Office for Civil Rights (OCR) of the Department of Education (formerly of the Department of Health, Education and Welfare) informed you that it planned to conduct an investigation of the above referenced complaint alleging discrimination on the basis of sex in the intercollegiate athletic program. The complaint alleged that the University is not accommodating the interests and abilities of its female students as required by the Title IX Regulation. In addition, the complaint alleged sex discrimination in the provision of athletic-based financial assistance, the assignment and compensation of coaches, the provision of locker rooms, practice and competitive facilities, the provision of trainers, recruitment, the provisions for travel and per diem, housing, and publicity.

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 (hereinafter cited as Title IX), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

In addition, the provisions of HEW's implementing regulation for Title IX, 34 C.F.R. Part 106, which became effective on July 21, 1975, and was adopted by the Education Department on May 9, 1980, set forth specific requirements regarding intercollegiate athletics (copy enclosed). Athletic scholarships are addressed at 34 C.F.R. Section 106.37(c). The general prohibition of discrimination on the basis of sex in intercollegiate athletic programs is addressed at 34 C.F.R. Section 106.41.

Because the Title IX regulation established separate legal standards for the provision of equal athletic opportunity in program areas other than financial assistance, OCR has assessed compliance with the two sections of the regulation individually.

As a means of assessing compliance, we have followed the directions provided in the Policy Interpretation issued by the Department of Health, Education, and Welfare on December 11, 1979. 44 Fed. Reg. 71413 et seq. (1979).

In assessing compliance with Section 106.37, OCR considered 1) whether the total amount of athletic scholarship aid available to male and female athletes was substantially proportionate to their rates of participation in intercollegiate athletics; and 2) whether different types of non-grant athletic assistance were proportionately available to male and female athletes.

We assessed compliance with 34 C.F.R. Section 106.41(c) by reviewing the overall intercollegiate athletics program. We reviewed the ten factors listed in the regulation plus the recruitment of student athletes and the provision of support services. (As explained in the Policy Interpretation, the regulation authorizes OCR to consider factors other than those listed in the regulation.)

In each program area we examined whether the availability, quality and kinds of benefits, opportunities and treatment provided were equivalent for both sexes. Equivalent is defined as equal or equal in effect. It is important to note that we compared the men's program and the women's program on an overall basis, rather than on a sport-by-sport basis that would pair, for example, men's basketball and women's basketball. Where disparities were noted, we considered whether the differences were negligible. Where the disparities were not negligible, we determined whether they were the result of nondiscriminatory factors. Finally, we determined whether disparities resulted in the denial of equal opportunity to male or female athletes, because the disparities collectively were of a substantial and unjustified nature, or because the disparities in individual program areas were substantial enough in and of themselves to deny equality of athletic opportunity.

The regulation at 34 C.F.R. Section 106.41(c) provides that "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex." Where appropriate, we have considered the level of funding for men's and women's programs in assessing the equivalence of benefits and opportunities.

SUMMARY OF FINDINGS

Athletic Financial Assistance

In 1981-82, Auburn awarded 83% of all financial aid based on athletic ability to men and 17% to women. Men comprised 75% of all participants while women comprised 25% (1981-82) of all participants. OCR determined that the differences in these awards were significant and finds that Auburn University is not in compliance with 34 C.F.R. Section 106.37(c).

Other Program Areas

OCR finds that Auburn University is providing male and female athletes equivalent treatment, benefits and opportunities in the following areas: provision and maintenance of equipment and supplies, scheduling of games and practice times, opportunity to receive academic tutoring and assignment and compensation of tutors, provision of medical and training facilities and services, provision of housing and dining facilities and services, publicity, and provision of support services.

OCR found that benefits, opportunities and treatment were not equivalent in the areas of travel and per diem allowances, coaching, the provision of locker rooms, practice and competitive facilities, recruitment of student athletes, and the accommodation of interest and abilities.

Enclosed is a Statement of Findings which provides a more complete description of the general background, scope and method of investigation of the review. It states the factual findings of the investigation and describes the bases for the conclusions. The report is divided into two principal parts: Athletic Financial Assistance and Other Program Areas.

This letter of findings addresses only the issues listed above and should not be interpreted as a determination of Auburn University's compliance or noncompliance with Title IX in any other respect. It should be emphasized that the findings and conclusions in this letter and the attached Statement of Findings are based on the applicable provisions of the Title IX implementing regulations and the Policy Interpretation described above.

You are requested to submit a plan to correct the violations of Title IX within 7 days. After receipt of the plan, there will be an evaluation period during which we shall communicate with you or your representatives, as necessary, regarding clarifications or modifications of the plan. After this evaluation period, OCR must either accept the plan or initiate enforcement proceedings. We are compelled to adhere to specific timeframes in resolving a case by an Order of the U.S. District Court of the District of Columbia, dated March 11, 1983. OCR is available to assist you in developing an acceptable corrective plan.

The Freedom of Information Act requires that the Office for Civil Rights release this letter and other information about this case upon request by the public. In the event that OCR receives such a request, we will protect information that identifies individuals or that may constitute an invasion of privacy, and will inform the University if we are compelled to release information.

We wish to thank you and your staff for the cooperation shown throughout this matter. If you have further questions, please do not hesitate to call me at (404) 221-2954, or Louis O. Bryson, Sr., Director, Postsecondary Education Division, at (404) 221-2970.

Sincerely yours,

William H. Thomas
Director

Enclosures

Al
Auburn U
IX
Caskey
04-81-2005

FILE CODE: PED 8-19-83
8-19-83

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY FOR CIVIL RIGHTS

MAR 6 1984

Dr. Bryce Jordon
President
The Pennsylvania State University
201 Old Main
University Park, Pennsylvania 16802

Dear Dr. Jordon:

The Office for Civil Rights (OCR) advised you on February 23, 1982 and April 14, 1982 of its decision to investigate the complaint against The Pennsylvania State University (Penn State) filed by Mr. Timothy K. Conley on behalf of the Women's Soccer Club under Title IX of the Education Amendments of 1972. In letters dated March 15, 1982 and May 6, 1982 Penn State declined to participate in the proposed investigation pending judicial or executive clarification of whether Title IX is applicable to a program or activity which is not the recipient of Federal funds.

In light of the recent Supreme Court decision in Grove City College v. Bell, it appears that OCR does not have jurisdiction to investigate the complaint of sex discrimination in Penn State's athletic program. We are, therefore, closing the above referenced complaint.

Sincerely,

Harry M. Singleton
Assistant Secretary
for Civil Rights

U.S. DEPARTMENT OF EDUCATION
3535 MARKET STREET P.O. BOX 13716
PHILADELPHIA, PENNSYLVANIA 19101

REGION III

OFFICE FOR
CIVIL RIGHTS

MAR 08 1984

Our Ref: 03770308
03812028

Dr. John Toll, President
University of Maryland College Park
College Park, Maryland 20742

Re: Title IX Intercollegiate Athletics Compliance Review

Dear Dr. Toll:

By letter dated February 23, 1984, the Office for Civil Rights sent the University of Maryland College Park (UMCP) a statement detailing those aspects of its intercollegiate athletic program which we had concluded violated Title IX of the Education Amendments and its implementing regulation at 34 C.F.R. Section 106.41(c). These areas had been identified previously for the University and were discussed at a meeting with UMCP officials and representatives on January 24, 1984.

On February 27, 1984, we received a letter from Assistant Attorney General Frederick G. Savage, on behalf of UMCP, responding to the concerns that OCR and UMCP representatives had discussed at the January 24, 1984 meeting. This letter set forth actions already taken and planned to be taken by the University in the areas of travel, provision of locker rooms, recruitment, support services, and the accommodation of student interest.

Since receiving Mr. Savage's letter, we have carefully reviewed our records of Federal financial assistance to UMCP's athletic program. We have concluded that we do not have jurisdiction to pursue this matter further, since the outstanding issues do not concern the operation of UMCP's athletic financial assistance program, which we found to be in compliance with Title IX and 34 C.F.R. Section 106.37(c). We remain available to provide members of your staff with technical assistance in the area of intercollegiate athletics, upon request.

I would like to thank you and your staff for the courtesy and cooperation extended during the course of this review.

Very truly yours,

Ronald Gilliam
for Dewey E. Dodds, Director
Office for Civil Rights
Region III

cc: Frederick G. Savage

OUTLINE OF TESTIMONY OF WILLIAM L. TAYLOR FOR THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

I. Importance of statutes barring discrimination with the use of federal funds:

A. As a means for enforcing constitutional rights that were widely denied. Ex. Enforcing *Brown* v. *Board*, and

B. As a means for declaring rights to nondiscriminatory treatment not otherwise protected Exs. *Lau* v. *Nichols;* equal treatment for women in private colleges, equal opportunity for disable people in public facilities.

II. Prior to *Grove City*, the coverage provisions of the statute were broadly interpreted by Congress, by the administering agencies and by the courts.

Ex. Federal assistance to elementary and secondary schools has always been treated as aid to public school systems, not aid to particular schools or to particular activities within schools.

III. The *Grove City* decision exempts from coverage discriminatory acts which should be covered.

Ex. Discrimination in class room or extracurricular activities by colleges that benefit from student loans.

IV. What S. 2568 does: restores pre-*Grove City* interpretation:

A. Restores institution-wide coverage by using "recipient" in place of "program or activity" narrowly construed in *Grove City*. Meaning of institution-wide coverage as applied to State and local governments, and

B. Retains narrower "pinpoint" concept as applied to fund termination proceedings by requiring nexus between federal assistance and discriminatory activity.

V. What S. 2568 does not do:

A. Does not extend coverage beyond particular institutions that receive federal assistance. Ex. Does not extend coverage to state mental health institutions if only Department of Transportation receives federal assistance;

B. Does not extend coverage to institutions, e.g., small grocery stores that handle food stamp coupons, that were uncovered pre-*Grove City;*

C. Does not permit termination of funds that do not support discrimination;

D. Does not broaden existing definition of "federal assistance";

E. Does not in any way broaden or narrow current interpretations of substantive rights; and

F. Does not change or complicate existing methods of implementation. E.g. use of lead agency where several agencies extend assistance.

VI. Arguments that have been made against S. 2568, e.g. interference with principles of federalism, are really objections to battles that opponents of civil rights lost in 1964 and since.

STATEMENT OF WILLIAM L. TAYLOR

Mr. TAYLOR. I should say I am William Taylor and I am here representing the Center for National Policy Review and the Leadership Conference on Civil Rights. And I should say, Senator, that I particularly appreciate the opportunity to appear here.

Senator HATCH. We are happy to have you here.

Mr. TAYLOR. I have been taking some notes, and I guess the three of us are part of what has been loosely referred to as the Civil Rights Community, and we have been labeled here by witnesses this morning as lacking credibility although somehow able to pull the wool over the eyes of an unsuspecting Congress. We were told that we are disingenuous and bounty hunters, and so here we are, tattered and in disarray. And I appreciate your taking us in and giving us a home, if only temporarily.

Senator HATCH. I do not think I said any of that; however, there have been some strong feelings here today.

There is no question that your organizations are very powerful and are very much listened to by the Congress of the United States. And as you know, this Committee has had all of you before it a number of times, including my Labor Committee. So we have a great deal of respect for all three of you. But there is no question in my mind that you folks are very articulate and understand what you want very, very well. And as far as this Senator, you have my respect.

Mr. TAYLOR. I appreciate that, Senator. I was not fishing for compliments.

Senator HATCH. I understand.

Mr. TAYLOR. Let me say a word because I think it is necessary for the sake of perspective about what I regard as the fundamental importance of these four statutes that bar discrimination in the use of Federal funds as a means of carrying out our national commitment to eradicate discrimination.

We have just celebrated the 30th anniversary of *Brown* v. *Board of Education.* Some of us remember that 10 years after the *Brown* decision, when Congress was acting on the 1964 bill, including title VI, there was almost no compliance with the Supreme Court's decision interpreting the 14th amendment. Maybe one black child in 100 in the Deep South was going to school with white children. There was widespread discrimination of the most blatant sort in almost any area you can mention. Minority doctors could not practice in most hospitals. Minority patients were segregated in wards or denied treatment entirely. And title VI, in a short period of time, became the means for implementing that constitutional guarantee that had been clear at least since 1954. So it is importantly a means for enforcing constitutional rights and it has proven to be an effective means.

The statutes have also been a method for declaring rights to nondiscriminatory treatment that were not otherwise specified in the Constitution and laws.

For example, the right of children who speak a foreign language to participate in school systems; the right to equal treatment of women in private colleges, the subject of the *Grove City* case; the right of disabled people to get a chance to prove their potential, not to be faced with barriers that do not enable them to function in public schools and colleges and other places. That is what we are talking about here, I think, this morning, Senator, these fundamental commitments, and because of the variety of testimony, I think it is wise to keep that in mind.

I would also like to say a word about what you mentioned in your opening statement about the seeming strategy of no amendments to the bill, and I do not think I would characterize it the way you did. When we have all of these four statutes before us as they inevitably are, there are all kinds of temptations to enact legislation that people may have had in mind that has nothing to do with the *Grove City* case.

I, for example, would very much like to see the partial exemption for employment under title VI removed. I would like to see title IX extended so that it covers not only educational programs but other forms of Federal assistance. I am sure one could expand on the list. But I do not think this is the time or the place to do that kind of thing.

At the same time, I think I would not characterize your position wrongly if I said that you have some real difficulty in the substantive standard that has been employed under title VI and other statutes, whether it goes too far in using an effects test, and whether there should be a substantive standard of intent. And you and I disagree about that subject, but I would say this is not the time nor the place to be revisiting those kinds of questions. We have a very short session of Congress. All of us have things, as I say, that we regard as very important, but I think if the problem that is exemplified by the *Grove City* case is determined to be the important problem, it has to be isolated and dealt with separately. In other words, all of us have to subject ourselves to a kind of self-discipline and say that we will take up our other issues at another time.

Senator HATCH. Of course, as you know, a lot of people feel that this bill, as it is presently written, sharply expands the scope of the effects test. That is one of the prime concerns here on the part of a number of people such as Professor Fried. It does not avoid that particular argument which I see as the most difficult civil rights issue of our times.

Like you say, we differ on that. I think we are both sincere and I think both of us want to see effective civil rights enforcement across our country. You feel that we will reach that in a better way through the results or the effects test. I feel otherwise.

But I may be wrong and you may be right. But I think we are both sincere in our respective points of view. I would just say that disparate impact is not the same as discrimination in my view. You and the leadership conference apparently feel that it is. But I feel that it is not. I am very sincere in that belief and, yet, I think I share the same feelings you do about having a nondiscriminatory society.

Well, go ahead please.

Mr. TAYLOR. Well, there is a temptation to get into that argument but I would like to avoid it.

Senator HATCH. I will avoid it also.

Mr. TAYLOR. But the one thing I would like to say is that in no way does this legislation deal with the question of the substantive standards to be applied under any of these statutes. Let me take two of the questions you asked in your opening statement about employment. You understand, of course, that I would not agree with your characterization of things as having to get to the "proper numbers," which is the word you use. There is no way that these amendments change the substantive law with respect to employment discrimination as your examples suggest.

Almost all of the institutions that you are talking about are already covered by title VII, if they are not covered by title VI or title IX or other statutes, but the point is that the substantive standard remains the same. Whatever it is, however we might want to characterize it.

So I think there is no difference in that regard and I think to me that is a very important point.

Let me, without trying to rehearse, things that other witnesses have dealt with, I do agree with Ms. Greenberger and with Mr. Tatel that if you review the regulations, the administrative interpretations of this statute and the court decisions, over a period beginning in 1964 with title VI, you would see that with few exceptions all have been interpreted broadly. The interpretation has been to cover institutions, not to construe program or activity narrowly so that, for example, where there has been Federal aid to elementary and secondary schools, that has not been treated as aid to a particular school or a particular activity within a school. That has been treated as aid to the school system carrying with it an obligation not to discriminate throughout the school system. And if you look at what the statute does and what the regulations say, I think you will conclude that that is the specific problem that is addressed by S. 2568.

Just a couple of additional points on some of the questions you raised and some of the questions that have been raised by the witnesses.

This bill does not permit the termination of funds that do not support discrimination. The pinpoint concept is retained in the bill, and if you get termination, which is a procedure, as you know, that is rarely used, a connection will have to be established between the funds and the discriminatory activity. In that respect, it is no different from the revenue sharing law which has a separate statute and a separate administrative apparatus, but I do not understand the basic administration of the laws to be any different, and no one has pointed here today to an instance in which funds could be terminated under any of these statutes without showing a connection to discriminatory activity.

It also does not broaden the existing definition of Federal assistance.

Senator, you raised the question about whether tax subsidies of one kind or another might be deemed to be Federal financial assistance, and you got from one of the witnesses a lengthy answer about the Supreme Court's fairly recent decision in the *Bob Jones* case. Well, the fact of the matter is that that decision was not an interpretation of title VI or any other civil rights statute; that was an interpretation of this Internal Revenue Code and there is nothing in S. 2568 that would broaden the definition of Federal financial assistance to take under its umbrella tax subsidies or tax exemptions that were not previously considered Federal financial assistance.

Finally, it does not change or complicate existing methods of implementation. These are complex statutes, of course, and the simple justice that President Kennedy talked about turns out to be fairly complex in its administration. But over the years, methods have been evolved by Federal agencies to prevent them from tripping over each other's feet. There is a lead agency concept. The agency that has the most interest in a particular area is the agency that handles the matter, and there is no reason under S. 2568, as under previous laws, that sensible arrangements cannot and will not be worked out to administer these statutes in a sensible way.

I guess, in conclusion, Senator, I would say that a lot of the arguments that I have heard here this morning are really arguments about the fundamental basis for title VI and title IX and 504 and the Age Discrimination Act. There has been talk about principles of federalism and about undue interference with States. And when we are talking about trickle up and trickle down, we are going to be precise in answering your questions on those subjects. But we should remember that there is a basic 14th amendment principle that extends to States and localities of nondiscrimination, so even if this statute had a far greater reach than it does have, I am not sure what basic principle would be violated by saying that States and localities ought not to discriminate against anybody on the invidious grounds that are dealt with in these statutes.

You said States, you said there was a right of State and local government to be "somewhat free," and I agree there is that right. But that right does not encompass a right to discriminate against their citizens.

We have heard arguments about infringements upon private property rights and again I would say, Senator, that those basic issues were settled in 1964 and 1972 when these statutes were enacted in the first place. Institutions which hold themselves out to the public as Grove City and Hillsdale and other colleges do, as open to applications ought not to be free to discriminate on the basis—on any invidious grounds. And they may say and they may well be right that they would not discriminate in any event. But it is a total misconstruction of history for witnesses to sit before you today and say it all happened through voluntary action; that the Federal Government was unwarrantedly intruding in an area where it was not needed when it said that there must be basic rules of nondiscrimination.

There is—way back, this goes back about 1959 or 1960, a California judge who stated what the basic principle was, and he said that when someone dips his hand into the Federal Treasury, a little democracy ought to cling to whatever is withdrawn. I think that basic principle holds good today.

Senator HATCH. Well, thank you.

Let me just ask a couple of questions.

Mr. Tatel, in creating the legislative history on this issue, is it your intention that S. 2568 reflect nothing more than the precise state of the law prior to the *Grove City* decision?

In other words, if there is uncertainty about the application of this bill in some regard, can we look to the preexisting law to provide us with some direction?

Mr. TATEL. Yes, I think that is absolutely right. I think this statute is nothing more than a jurisdictional one. It restores the jurisdiction of the statutes to what it was prior to *Grove City*. All of the court cases, and administrative interpretation which existed before *Grove City* would be guides to the law under S. 2568.

Senator HATCH. Well, thank you.

Do both of you agree with Mr. Tatel on that?

Mr. TAYLOR. I agree with that. I agree with what Mr. Tatel said, and I would give a specific example because we did not deal with this.

You raised questions about grocery stores and pharmacies. To the extent that grocery stores and pharmacies were covered prior to the *Grove City* decision, they could continue to be covered. I would have to say that as pertains to Title VI though, food stamp assistance is Federal assistance. I do not know of any instance over the period of 18 or 20 years where it has been applied to a grocery store. But the answer to that question is whatever the law was prior to *Grove City*, it continues to be.

Senator HATCH. So you both agree that this reflects nothing more than what the law was prior to *Grove City*.

Do you agree with that, Ms. Greenberger?

Ms. GREENBERGER. In general, yes. Of course, to the extent that there are district court or court of appeals cases leading up to *Grove City,* such as the *Hillsdale* case, which limit coverage, such cases would not remain. But the basic substantive interpretations of those statutes would remain as would all similar administrative interpretations and all the court decisions.

Senator HATCH. Let me ask you this, Ms. Greenberger.

You are no doubt aware of the pending Baby Doe controversy. If S. 2568 is enacted into law, is there any doubt in your mind that hospitals which receive medicare or medicaid assistance will be required to abide by the Federal Government policies on handicapped discrimination insofar as they relate to the Baby Doe situation?

Ms. GREENBERGER. Well, I must say that I am aware of the Baby Doe controversy as somebody who reads the newspaper and follows these issues. It is not my particular area of expertise.

I do think certainly that the issue of coverage with respect to section 504, as it applies to patients in hospitals in general, is affected directly by this legislation. I do not know what the coverage decision would be if the *Grove City* analysis were applied to hospitals with medicaid and medicare coverage, and whether patients would have any 504 rights outside the billing office under the current state of the law now.

Mr. TATEL. Senator, if I could add to that.

Senator HATCH. Mr. Tatel.

Mr. TATEL. The Justice Department has argued in all of the Baby Doe litigation that the receipt of medicare and medicaid funds does subject hospitals to section 504 jurisdiction. That argument will be just as valid, no greater or no less if S. 2568 is enacted. Whether funds could actually be terminated for a violation of the so-called Baby Doe regulations would depend upon whether or not the funds are actually used for or affected by what the Justice Department considers to be discriminatory activity. That would not change either.

But unless S. 2568 is passed, the Government's ability to argue that hospitals which receive medicare and medicaid funds are covered in all of their activities is greatly limited. The Justice Department will, under the current state of the law, have to prove before it can even try to apply Baby Doe regulations to a hospital, that the medicare and medicaid funds actually went to the particular department at the hospital, in this case the infant care unit, actually used those funds. Since it is probably highly unlikely that infant care units receive medicare or medicaid funds, the Government's efforts to enforce its Baby Doe standards will be greatly limited unless S. 2568 is passed.

Senator HATCH. Well, thank you very much. We want to express our appreciation to you waiting so long to testify and, of course, giving the testimony that you have.

With that, we will recess this committee until further notice. Thank you.

[Whereupon, at 2:18 p.m., the subcommittee adjourned, subject to the call of the Chairman.]

CIVIL RIGHTS ACT OF 1984

TUESDAY, JUNE 5, 1984

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:06 p.m., in room SD-226, Dirksen Senate Office Building, the Honorable Orrin G. Hatch, chairman of the subcommittee, presiding.

Present: Senators Dole, Mathias, Grassley, and Kennedy.

Staff present: Dick Bowman, counsel, Committee on the Judiciary; Stephen J. Markman, chief counsel and staff director; Randall R. Rader, general counsel; Carol Epps, chief clerk; and Deborah Dahl, clerk, Subcommittee on the Constitution.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this marks the second of 2 days of hearings by the Subcommittee on the Constitution on Senate bill 2568, the so-called Civil Rights Act of 1984.

During our opening day last week, we took testimony critical of this measure from the U.S. Commission on Civil Rights, as well as the president of Grove City College, and two other independent colleges. In addition, there were two distinguished academics, Prof. Charles Fried of the Harvard Law School, and Prof. Jeremy Rabkin of Cornell University.

A number of recurrent themes were raised about the proposed legislation from these individuals and organizations, all of whom have been strong supporters of title IX in the past:

First there was the concern that S. 2568 represented far more than a mere restatement of the law existing prior to the Supreme Court's *Grove City* decision earlier this year. According to the U.S. Commission on Civil Rights, for example, the bill would effect significant changes in title IX. In addition, the proposal would amend three civil rights laws not even at issue in that decision—title VI of the 1964 Civil Rights Act, section 504 of the Rehabilitation Act, and the Age Discrimination Act.

Second, there was concern that S. 2568 failed to respect traditional lines of demarcation between the Federal, State, and local governments. According to Professor Fried, this legislation would "subject every single activity of State or local governments to the supervision of every Federal agency which disburses money to any part of such a State or local governmental entity."

Third, there was concern that S. 2568 failed to respect traditional lines of demarcation between public and private activity. Professor Rabkin, for example, expressed concern that this bill would allow Federal funding to be used as a "club to coerce private institutions into what some would define as ideal norms of conduct."

Given the pervasiveness of Federal dollars, fear was expressed that virtually every private business or institution might be subject to the tens of thousands of words of title VI rules and regulations.

Fourth, there was concern expressed that as a result of this blurring between public and private entities, the role and the vitality of private educational institutions might be diminished. Bruce Hafen, president of the Association of Presidents of Independent Colleges and Universities, testified that the distinctiveness of private colleges and universities as well as their diverse and varied characters was necessary to justify their far higher tuitions relative to public institutions.

Fifth, there was general agreement that there were no conceptual limits whatsoever on the application of Federal rules and regulations to wholly private institutions and businesses. As a result of the so-called trickle-down and trickle-up and trickle-around theories there was virtually no entity in the United States that could remain indefinitely free of Federal regulatory requirements.

Sixth, finally there was substantial concern expressed that the basic problem with S. 2568 was that we are no longer talking about tradition color-blind notions of discrimination in the context of these civil rights statutes. Rather, through employment of the so-called effects test, for defining discrimination, we are focusing principally upon equal results and equal outcome instead of equal access and equal opportunity.

To extend the principal that individuals and organizations should not treat individuals differently because of their race or color, or ethnic background was one thing. To extent the principle, however, that individuals of different races and colors and ethnic backgrounds have to be represented proportionally everywhere is a far different notion.

Ladies and gentlemen, I would emphasize that the issue here today is not title IX. It is not title VI. It is not a commitment to civil rights.

Rather, it is whether the pending bill represents a focused response to the Supreme Court's decision in *Grove City* clarifying the provision of controversy there, or whether it seeks to use this direction as an excuse for enacting the most far-reaching expansion in civil rights law conceivable.

To evidence the unique character of the pending legislation, let me quote relevant parts from a letter to all Members of Congress that was sent yesterday by the American Farm Bureau Federation. To the best of my knowledge, the Farm Bureau has never before been critical of any proposed piece of civil rights legislation.

> DEAR SENATOR HATCH: Farm Bureau members throughout the Nation are firm believers and supporters of the Constitution, the Bill of Rights and the basic precepts of our republic which encompass fair and nondiscriminatory treatment under the law for all citizens regardless of race, national origin, age, or sex. * * *
>
> As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of Federal

assistance may be an open invitation to the Federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation. That is a serious enough threat to the integrity of State and local governments. However, the language in this bill may be interpreted to bring under the regulation of the civil rights statutes a large portion of all private sector activity, even individual farmers and ranchers who are recipients of various forms of public assistance or who "receive support" from government programs may be affected.

I'll just put the complete letter into the record so all can have a copy of it.

[The information follows:]

American Farm Bureau Federation,
Washington, DC, June 4, 1984.

Re S. 2568—Civil Rights Act of 1984.

Hon. Orrin G. Hatch,
U.S. Senate,
Washington, DC.

Dear Senator Hatch: Farm Bureau members throughout the nation are firm believers and supporters of the Constitution, the Bill of Rights, and the basic precepts of our Republic, which encompass fair and nondiscriminatory treatment under the law for all citizens, regardless of race, national origin, age, or sex.

We are also firm believers in the private enterprise economic system and that property rights are an important part of civil rights. We are opposed to any further expansion of the power and authority of the federal government over state and local government, as well as the private sector.

As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of federal assistance, may be an open invitation to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.

That is a serious enough threat to the integrity of state and local governments. However, the language in this bill may be interpreted to bring under the regulation of the civil rights statutes a large portion of all private sector activity. Even individual farmers and ranchers who are recipients of various forms of public assistance, or who "receive support" from government programs may be affected.

Further, these statutes provide for the right of private action, with legal fees awarded to the prevailing party. Thus, farmers and ranchers may find themselves defendants in thousands of lawsuits arising from employment practices, credit, marketing, and other activities that could be construed as covered by this legislation.

We do not oppose legislation to clarify the Court decision in Grove City College vs. Bell. However, we are opposed to the enactment of S. 2568 as it is now written.

We have read the statements by the sponsor and several co-sponsors made on the floor of the Senate on the introduction of this bill, including the assurances that it is not the intent of the sponsors "to break new ground," and that the bill is not intended to alter the current definitions of recipient or federal financial assistance, nor that it is intended to alter substantive protections afforded by the laws that are to be amended.

However, we have also read the testimony of William Bradford Reynolds, the Assistant Attorney General for civil rights, and the analysis of this bill prepared by the chief counsel of the Office of Management and Budget. After considering those analyses and others that have been prepared by competent attorneys, we have concluded that this legislation is moving through the Congress with far too much haste and that the possible implications in this bill need to be given much more study before the Senate proceeds to enactment.

While the Committee on Labor and Human Resources is to be commended for the hearings that have been held or scheduled, we believe that additional hearings need to be held and that the bill should have an additional reference to the Judiciary Committee for further consideration.

Sincerely,

Robert B. Delano, *President.*

Senator HATCH. We occasionally hear partisan critics of President Reagan describing his as the "teflon" Presidency, because nothing in the way of criticism seems to stick to him.

If I may be permitted to elaborate on the idea, I would suggest that S. 2568 would establish a "flypaper bureacracy." Because every dollar that the Federal bureaucracy disburses would attach to absolutely everything.

Once the dollar touches and individual or institution, no matter how remotely or how indirectly, that individual or institution is inextricably consumed by tens of thousands of words of Federal rules and regulations.

Now, sticking to my entomological metaphor, it seems to me that this bill would establish a spiderweb-like network of Federal rules across the Nation. Once an individual or institution comes into contact with it, no matter how fleeting, he is going to be caught forever. And I think we all have to understand that.

We have an outstanding hearing here today. Among others, we will have with us this afternoon Secretary of Education Terrel Bell and Assistant Attorney General for Civil Rights Mr. William Bradford Reynolds.

We appreciate the efforts that you've put forth to be here, and all witnesses, and at this time we'll turn to Senator Grassley for any comments he has.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, I certainly want to commend you, not only in your capacity as chairman of this subcommittee, but also because of your interest in this legislation in your role as chairman of the Labor Committee.

I believe that we are being exposed to a different perspective on this legislation, after having had an opportunity to look over testimony which was taken at the May 30 hearing. That hearing raised some questions about what the effect of this bill might be on State and Federal institutions.

Sponsors of this legislation emphasized originally that it is not their intent to break new ground with this bill. Last week's testimony in this subcommittee demonstrates that there are still questions about the legislation that deserves a response. There are still provisions of this legislation, in other words, that need to be clarified for a full understanding of the issue.

I find myself agreeing with a Washington Post editorial that cautions us to at least fully understand what the consequences of the legislation will be; and for that reason, if it hasn't been previously inserted in the record, Mr. Chairman, I would like to have that editorial, called, "Grove City Revised," from the Washington Post, included in the record.

Senator HATCH. Without objection, so ordered.

[The information follows:]

[From the Washington Post, May 25, 1984]

GROVE CITY REVISED

There was a good purpose for introducing legislation to overturn the Supreme Court's decision in the *Grove City* case. The bill was designed to make clear the intention of Congress to prohibit discrimination in all institutions that receive federal funds, not just in the specific program receiving those funds—an entire university, for example, not just the physics department whose labs were built with taxpayers' money. The bill overturns the more restrictive Supreme Court interpretation not only of the sex discrimination law at issue in *Grove City*, but also of other statutes prohibiting discrimination on the grounds of race, religion, national origin, handicap and age. Sponsors emphasized that the bill would not extend new protections but simply would make clear what was widely considered to be the law before the *Grove City* decision.

Does the bill, in fact, do more than its sponsors suggest? The Justice Department believes it does. Assistant Attorney General William Bradford Reynolds testified before a House committee this week that he thinks the bill makes three important changes that will greatly expand the federal role in civil rights enforcement. He believes that the definition of the term "recipient" is far more sweeping than any current understanding; he says that this bill would, for the first time, allow courts to order fund cutoffs to entire states when, for example, only one sub-unit of the state was discriminating; and he suggests that the new bill would require overlapping regulation with every federal grant-making agency responsible for monitoring every activity of a recipient. The bill's supporters protest, with extensive documentation, that each of these charges is a red herring; they have maintained that the bill is a simple corrective measure, not a sweeping revision.

Civil rights groups want no amendments to the bill. Understandably, they do not want to get bogged down in abortion questions and are willing to forgo amendments they would support—applying employment discrimination laws to Congress is one—in order to get quick passage. The questions Mr. Reynolds raises, however, do not fall into the category of extraneous baggage. They go to the very essence and breadth of the bill, and they should be examined. If the bill's supporters can satisfy their colleagues that the measure is narrow and simply corrective, they should have no trouble winning passage swiftly. Even if a majority is persuaded by Mr. Reynolds' arguments that the bill would make important changes, Congress may decide to adopt those changes. But in that case it should at least understand fully what the consequences of passage may be.

Members of Congress not only have the right to raise questions about proposed legislation—they are under an obligation to do so. Delaying tactics and irrelevant amendments designed to sink the bill should be fought. Reasonable inquires and careful attention are not evidence of anti-civil rights bias, however. They are precisely what Congress should be about.

Senator **Grassley**. That's the end of my statement. Since I have to leave at 2:40, I would like to have a question put before the committee that could perhaps be pursued in the way of questioning.

And it comes from the standpoint of my being chairman of one of your subcommittees of the full committee of Labor and Human Resources. I'm chairman of the Subcommittee on Aging, and I'm particularly interested in the application of this bill to the Age Discrimination Act of 1975.

Frankly, the legislative history of this act has never been clear as to its application. And so I would like to have anybody who is testifying today, but particularly the first panel, but anybody else as well, give me some examples of how this legislation will impact upon that act.

Senator **Hatch**. I think that is a very good point. Nobody has really focused on that before this time. So I appreciate the Senator bringing it up.

Thank you, Senator Grassley.

We are at this time very happy to welcome to the committee the distinguished Secretary of Education and his two colleagues. We're very grateful for you taking the time to be with us today, Mr. Secretary.

STATEMENT OF HON. TERREL H. BELL, SECRETARY OF EDUCATION; ACCOMPANIED BY HARRY SINGLETON, ASSISTANT SECRETARY FOR CIVIL RIGHTS, AND EDWARD ELMENDORF, ASSISTANT SECRETARY FOR POSTSECONDARY EDUCATION

Mr. **Bell**. Thank you, Mr. Chairman. I am pleased to introduce on my left Dr. Edward Elmendorf who is Assistant Secretary for Higher Education. He is thoroughly familiar with our aid programs, our Federal financial assistance programs and may be useful to the committee as we get into conversation. On my right is Harry Singleton, who is our Assistant Secretary for civil rights. He has had considerable experience in enforcing the existing civil rights laws and regulations.

I would like, Mr. Chairman, in respect to your time to submit my statement for the record, and I would like to just paraphrase some points quickly and then maybe we can get right to the questions.

Senator **Hatch**. Without objection, we'll put your complete statement in the record. We appreciate your summarizing it.

Mr. **Bell**. I would like to emphasize at the outset that we believe that with the benefits and privileges of Federal aid come certain responsibilities, and primary among these is the duty to insure that our funds aren't used to support discrimination in any way. So I would just emphasize that we want to continue to act forcefully and quickly to take appropriate action to enforce the civil rights laws and to guard against discrimination.

We see that as a great responsibility in the Department of Education, and to that end we would welcome and would support enactment of legislation that would respond to the Supreme Court *Grove City* decision and to reverse those aspects of that decision that limit to some extent our coverage and enforcement.

And I would just like to emphasize that the President has expressed his concern that we not diminish our enforcement authority and our enforcement activity.

The Office of Civil Rights, to indicate that we do have a problem, that legislation can assist us with, the Office of Civil Rights has had to close 13 higher education cases and four elementary and secondary education cases because of the *Grove City* opinion, and the construction of the term "program" or "activity" in the civil rights statutes.

But I also want to state that we'll take our steps to reopen those cases if we can, if it can be lawfully done, if legislation is enacted to reverse the impact of *Grove City*.

But what we're concerned about, Mr. Chairman, you have already touched on. There isn't such a great policy difference on the purpose of the legislation as there is for its impact. We've had our attorneys in the Department of Education review this and discuss it with us. And we are concerned, and you've heard it so much I won't go into it a great deal, about the ambiguity in the statute.

Lawyers are now reading, even attorneys in our own Department, are reading the provisions and they're coming up with opposing views. And I can't emphasize too much from the experience that we've had in trying to carry out, enforce, and interpret these laws to 16,000 school districts and some 7,000 higher education and postsecondary recipients, how important it is that we have clear and unambiguous language.

We're concerned about the definition of "recipient" that is in the bill. And we understand that some felt that they drew this language from our existing civil rights regulations. But the context in which it has now been placed leads us to conclude that it does more, much more than reverse the impact of *Grove City*.

And we would just plead, knowing how fast the train moved on the House side, that time be taken in the Senate to do some careful analysis and changing of the language to clear up these ambiguities.

I won't go into a further technical discussion about the new definition of the word "recipient." But when you get that and you include it with some other language which refers to entities that receive support from and then language that extends this on beyond that, and you very clearly summarized that, Mr. Chairman, in your opening comments. We do have language that attorneys already are drawing different conclusions from.

Now, I would just emphasize in that regard that historically we have looked to individual institutions to comply with the civil rights laws. We've not looked to a statewide, multicampus system to do that. And we think that it's quite clear with the language that we have in this bill that this is going to be expanded in that regard.

It's going to cause us a lot of grief and considerable chaos in how we administer the law. And as I emphasize that, and express my concern about it, I want to at the same time emphasize as clearly as I can that I believe, and I would like to make it very plain and emphasize it time and again, I believe that we need some language enacted if we're going to be able to enforce title IX and the other civil rights laws because of the action of the U.S. Supreme Court.

And so my plea is that we make the language more clear, that we clear up the ambiguities that attorneys are already beginning to argue about, that we look at some of the parenthetical language that has been thrust into the legislation as it refers to subunits and entities and recipients, and that we make sure that the new language doesn't lead to expanded coverage that extends far beyond what we believe that the committee anticipated.

There are such deletions as the leaving out of the term "ultimate beneficiary" when the drafters of the bill went to our civil rights regulations. As we read it, we can see where language is just lifted out of there and placed in the bill. But when they leave out such terms as "ultimate beneficiary" and when they define "recipient" like they have—and I'm sure their intent was to correct the impact of the *Grove City* decision—they just leave open the possibility of some of the worst case scenarios regarding students that are individual recipients of Pell grants, individuals that are individual recipients of food stamps, social security and all of the rest.

And I don't want to be one that's coming here and expressing a lot of expansive interpretations and use scare tactics or overdrawn language in that regard, because I would emphasize again that we believe that we need legislation to reverse the restrictions of *Grove City*.

I can tell this committee that until we get that we will continue to have cases like those 18 higher education cases that we had to close that ought not be closed, and that we have the appropriate enforcement authority.

So I would just conclude my comments and the paraphrasing of my written testimony by saying that we all know that there are over 500 Federal district court judges; there are about 140 circuit court judges, plus the Supreme Court. And in the history that we've had, and Mr. Chairman, this is my third time in Washington where I have had to work in this arena. Attorneys just read language so differently. In fact, I've said a little bit humorously to some of you that are lawyers, that you make your living on ambiguity. And you surely will have a bonanza here if we don't clear up some of the language that we have.

I think if we take a bit more time, if we do some more defining of terms, if we could sit down, especially with some of our colleagues that have had to work with this—and we're working out there every day with the education community—I think we could work out the kind of language that would accomplish, I think, the purposes that the original sponsors had for this legislation when it was enacted.

I think their intent and their purpose is laudable. But I also would emphasize again that the original intent of enacting a reversal of the restrictive impact of the *Grove City* decision, we think, has been confused. Some of our strongest and most pro civil rights career attorneys in our department think that this language is going to go beyond that, and I would just plead that we take the time to do some more work with the language and then pass it and then hopefully in conference with the House we can clear up a lot of difficulty that we're going to have otherwise in this regard.

We are willing and anxious to work with you. We want legislation passed. I can't emphasize that too much. And as I'm here criticizing the bill, I don't want it to be construed as opposition to legislation, because I have firmly felt that we needed some legislation enacted if we're going to carry out our responsibilities in the Department of Education to enforce the civil rights laws.

We can do some drafting on this legislation, I think, to make some changes and clear up some definitions that would help us to maintain effective civil rights enforcement policy and for us to have what we need, the legal tools, to carry out our responsibilities.

I would close by saying that we've had a lot of practical experience in education. Many of us have worked there. I have spent almost all my adult life in that area. And we think that we can be helpful in this regard, to make some simple changes, a few of them, that would make this legislation less ambiguous and less controversial.

And so I would just conclude by making an appeal that we take the time to do a bit more thoughtful work on the drafting of the language. I thank you for the opportunity to be here and to express those views and we're ready, Mr. Chairman, to respond to questions.

Senator HATCH. Thank you, Mr. Secretary. We took testimony last week—we'll abide by the 10 minute rule so that all Senators will have an equal opportunity here—but we took testimony last week from the presidents of Grove City College, Hillsdale College, and Ricks College. Each of these individuals delivered what I thought was moving testimony on this issue which described the critical role of the small, private, independent colleges within our national educational system.

None of these schools to my knowledge, has anything other, than a spotless record with respect to the admission of minority students.

Let me ask you this fundamental question: Do you understand why such a college would want to remain totally free and independent of Federal rules and regulations? Do you understand why this impulse is totally unrelated to any desire to treat individual students unfairly?

Mr. BELL. Yes. After the *Grove City* decision, I had lunch with the chairman of the board and the president of Grove City College and talked at length with them. Now, this institution, and I'll cite them as an example of a handful of schools—not very many, a very small number—that are private, they're fiercely independent, and they don't want any Government help. They simply don't want it.

They act to make certain that they don't get it. They won't even receive the Pell grants on their campus and act as our disbursing agent because that would constitute receipt of a Government check.

And so we have had the alternate disbursal, or the ADS Pell grant system to accommodate them. They forego all of the campus based aid. They forego applying for title III of the Higher Education Act. They forego research grants. They forego construction assistance for their dormitories and academic facilities.

So they have a strong desire to be independent and to be totally free from any Government assistance.

Senator HATCH. Do you consider these honorable motives—to be free of Federal Government involvement?

Mr. BELL. Yes, I do. They don't want to fill out the Government forms; they don't want Mr. Singleton's staff on the campus conducting compliance reviews; and they don't want to be monitored.

It's a strong feeling they have that they can go it alone; they don't want any Government help. And the only thing that any of them have ever done was to admit an alternate disbursement Pell Grant student.

Now, this student applies and gets the check in the mail, deposits this check in their own private bank account and then pays their tuition. So as far as I am concerned, this is a private student, applying to their Government, getting a Pell grant and using that money in that regard.

Now, I've wanted, Mr. Chairman, to respect their right to be independent. I distinguish them from those who will take a Government check, who get all the campus based aid—and that's about 95 or 98 percent of all the institutions. Those that want that ought to come under compliance.

And so it was my view, when we started discussing this, and when we had debates within the administration, that alternate disbursal Pell grants were not aid to the institution.

Now, lawyers whom I respect read the law differently, including my colleagues in Justice. But then their conclusion was that the aid only led to the student aid office, and that's the way the Supreme Court found it.

So now as we reverse this legislation we're going to bring in these small numbers of independent institutions. They'll even have to forbid enrollment to a student who applies privately and gets a Pell grant or they're going to be brought in under these regulations.

I would emphasize that those institutions who receive Pell grants in the regular method, they receive a check from us, and they act as our disbursing agent. It's a large sum of money, and frankly, they get the interest float on that. And in addition to that, they're paid an administrative allowance for carrying out that responsibility.

And *Grove City* has foregone all of that in their desire to remain independent, and I just wish there was a way to respect their desire for independence. I respect those attorneys that have read the law, and I'm not trained in the law, so I don't know the technicalities of it, but it was my desire that they not be caught up in this and I feel bad that they were.

But at the same time, I had a strong desire that any institution that was caught up in it had to comply, and I didn't want to see it narrowed down to program or activity. I wanted it to cover the whole institution. So that was my position, Mr. Chairman.

Senator HATCH. Mr. Secretary, to what extent do we begin to subtly undermine the values and the benefits of private education by increasingly imposing upon such institutions the details and procedures of what some might call "public policy"? Isn't there something to be said for maintaining clear lines of distinction between the public sector and what amounts to essentially private institutions?

Do you feel that we are undermining those values and benefits?

Mr. BELL. Well, I think we are, and I would say that there are many private institutions that go after Federal dollars. They compete vigorously and aggressively for them. They take all the campus based aid. They're in Government contracts and research. And I think those private institutions—and that's most of them, that's the mainstream of American higher education—I think those private institutions ought to be required to comply just like the public ones do.

But these few private ones that have this fierce desire to be independent, I wish there were a way to respect their desire to do that.

Senator HATCH. Are you aware that the response of a number of smaller independent private colleges to the *Grove City* decision, including both Grove City College and Hillsdale College is to restrict admission now for those students receiving some form of indirect Federal assistance? This would include Pell grants, guaranteed student loans, veterans' benefits, any form of indirect assistance. Is this really in anybody's interest?

It seems to me that those students most likely to suffer as a result of this policy are precisely the students whom S. 2568 is ostensibly designed to help.

Mr. BELL. Well, I think that many of them are going to refuse to admit students, even who receive an ADS Pell grant or similar type of assistance. And my opinion is that that's carrying the coverage of Federal financial assistance further than the interpretation ought to be.

I don't question the law or the lawyers who read the law. The Supreme Court obviously read it that way. But I would philosophically wish that the law could be drafted in a way that would respect them, if that's attainable.

Senator HATCH. My ten minutes are up. Senator Grassley?

Senator GRASSLEY. You don't have, I know, through your Department much to do with the enforcement of the Age Discriminination Act of 1975, but you did hear my question originally that I thought I wouldn't be here to ask. And as you viewed the all-encompassing nature of the legislation that we're dealing with, in regard to that specific legislation, how do you see it impacting upon that act?

Mr. BELL. Well, out of the North Haven case—and, incidentally, Senator Grassley, that's where my first awareness of the program or activity restriction came up. And I would like to emphasize that that's where it came from, and not out of our administration's brief that was filed in the *Grove City* case.

But out of that we finally had the interpretation that title IX applied to employment, and maybe Harry Singleton could comment on that, as it relates to the age discrimination matter, and what cases he's had in that regard.

Mr. SINGLETON. Senator, it's rather difficult at this point to speculate on all the ramifications that one could expect as far as the impact on the Age Discrimination Act is concerned

But as you know, the act is designed to end age discrimination in federally funded health care programs, vocational rehabilitation, adult ed, and professional school admissions among others.

I think that when you begin to apply the standards, the definitions, and so forth contained in the proposed legislation, you would have a similar effect as you would have on the other jurisdiction granting statutes for us, VI, IX, and 504, of creating substantial concentric circles, if you will, ripples affecting the recipients of aid given by our Department.

Senator GRASSLEY. What if a person who was 65 or 70 years old, which I know would probably not happen, but were to apply to a medical school that was receiving Federal funds, as an example. What sort of a situation would your Department be in?

Mr. BELL. Well, they couldn't discriminate on the basis of age, in that regard.

I would emphasize, Senator, just so you understand the procedure under the statute and under the Adams court order, which is an order that we and our predecessors have been under for 12 to 14 years.

Under that court order we are required to respond within a certain timeframe when complaints are filed, and we have to dispose of cases in a very timely way. And anyone that files a complaint, we have an obligation to investigate it, whether we think it has merit or not, we have an obligation to investigate it.

Senator GRASSLEY. That raises another point, that we have a responsibility to consider. What does it do to the resources in your department if you have to police all the activities of every grant recipient that legislation like this would call upon you to do.

Mr. **Bell**. Maybe Mr. Singleton could respond to that. We do think that we're reasonably adequately staffed now, and that we were handling in a fairly expeditious manner the volume that we had before us prior to the *Grove City* decision.

Mr. **Singleton**. To hazard a guess, Senator, I would suggest I would have to have my staff allotment multiplied by a factor of 10. It would require an incredible amount of resources to go out and investigate all of the conceivable complaints that we could get with the ripple effect of this.

And I might add, too, that it could conceivably get me into areas where I don't tread at present. For example, I could find myself investigating a transportation case that might more properly come under the purview of the Department of Transportation because of the way this legislation is drafted which grants authority to trace funds down to the ultimate beneficiaries and so forth.

Mr. **Bell**. I think, Senator, if I could volunteer this, to be fair to the sponsors of legislation if legislation isn't enacted, then we have the burden of tracing the Federal financial assistance down to a program or activity. And what is it? For example, on a college campus, is it the college of science, or is it the department of chemisty in the college of science. And if you say, well, it's the department of chemisty, then is it the division of organic chemistry? Or is it a subunit of that, of biochemistry?

You see, you can carry this out to a finite program and it depends on who defines program. Until you define that language, that's why definitions are so important in this legislation.

Senator **Grassley**. Thank you, Mr. Chairman.

Senator **Hatch**. Senator Kennedy.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator **Kennedy**. Thank you very much, Mr. Chairman.

I want to express my appreciation to the Secretary for his appearance here today and for what I consider to be a forthcoming and useful and helpful statement about this particular issue.

As in so many occasions before the Labor and Human Resources Committee, the appearance of the Secretary is of great value to those of us who have responsibilities—whether it's in education, or now as members of the Judiciary Committee.

Mr. Secretary, all of us have seen times when we are considering legislation in the course of various hearings, that there can be different interpretation of various language. That is why we have hearings, and why this kind of an exercise is so important.

In the course of making a legislative history I believe the issues which are of concern to us can be resolved. It's obviously helpful in the particular area of education to get your recommendations and your suggestions.

I'm very interested in the fact that your attorneys believe that in these 18 cases which the Department of Education was bringing, that you had a very different interpretation of the scope of these antidiscrimination laws prior to the Supreme Court decision in *Grove City* than the Justice Department. I think that's extremely important and relevant.

We'll hear here today, I'm sure, spokesmen for the Justice Department who will say, "look, we're really enforcing what we understood to be the law in a whole series of cases for a very considerable period of time." And that just is not so.

And certainly it appears that your attorneys were preparing cases in the area of education that you feel as a result of *Grove City* you had to drop.

I'm wondering whether your testimony here represents the final position of the Department of Education and yourself. If we address the particular issues that you have raised here in terms of the definitions and in terms of scope, do you have any hesitancy in supporting legislation to deal with the basic problem which you've outlined before the committee?

Mr. BELL. Well, I think as I said earlier, and you came in, Senator, just as I was speaking, as I said before you came in, we think that we need legislation, and we believe that S. 2568, with some modifications, could meet the concerns that we've had. And I've tried to outline them there in my testimony?

Senator KENNEDY. That represents, really, the sum and substance of your objections?

Mr. BELL. Yes, sir. That's correct. And again, let me emphasize, I do believe that we need legislation in response to the *Grove City* decision.

I would just point out that the first time that I knew about it—now, maybe attorneys were aware of it earlier—but the first time I knew definitively that this program or activity definition was going to narrow down the coverage was in the *North Haven* case, which was another title IX case with the North Haven School District in Connecticut, in which we were involved.

This really wasn't the subject matter. The subject matter was whether or not title IX covered employment of employees. And in the *North Haven* case, they referred to program or activity, and after that it led to several other actions on district court cases.

We were involved in an enforcement matter with the University of Richmond in that Federal district court. And I think based upon the *North Haven* decision and the suggestion there, that judge came down in the direction that we didn't have jurisdiction.

So we couldn't even go on to the campus to trace the Federal assistance because of that interpretation.

And the problem is, Senator Kennedy, as we're dealing with 500 different Federal judges, we find ourselves, in order to avoid contempt, of having to go this way in this district court, because they interpret it in this direction; and the third circuit, of course, was the circuit that led the thing up to the *Grove City* decision by the Supreme Court, which is quite the opposite of some of the other decisions.

That's why I make such a plea that we clear up any ambiguity that there is in the language. I know it's easy to say that and tough to do it. Because when you start crafting more language, then another attorney raises another question in this regard.

As we've reviewed our title VI, and our section 504 language, we wonder if you deleted the program or activity language, which is in title VI of the regulations, if we couldn't come fairly close to what you want to accomplish by redefining recipient and some of the other terms.

We would be pleased to work with you on that, and work with the committee on it.

Senator **Kennedy**. I am just wondering whether we couldn't address those particular issues in terms of definition, in terms of the report rather than the statute. I don't know whether we can anticipate every possible eventuality in the language of the statute. If there is a question and issue about the words we as legislators use, the courts are to interpret the words, and they look to both the legislative history and the report. At least that's what our civics class taught many years ago.

Couldn't we deal with these particular questions which you address here in the report?

Mr. **Bell**. My concern about that, Senator Kennedy, is that after the legislation is passed, we're going to have to draft implementing regulations. To get that cleared in the process we need to go through OMB and so on, whether we go by the report language or by the statutory language. It would surely make it easier for us, and it would save us in confrontations with literally hundreds of institutions if you felt you could see your way clear to put some clarifying language in the statute, at least somewhat more than we have now.

I would plead for that. I think it will make our job easier, and I just want to emphasize to you that we have a strong commitment to civil rights enforcement, and we want to do a good job. We would like to get back to those 18 cases that we had to close, for example.

I would point out that right now we're having more cases emerge under title IX athletic enforcement than any others. We're convinced that there are some failures to provide equal opportunity for women in athletics, and we would like to lend more encouragement in that direction than we have authority to do now, because there isn't Federal financial assistance to many athletic departments. The clarifying language that we want would certainly help in this regard.

Senator **Kennedy**. Cases to terminate funding are only brought, as I understand, after numerous efforts to resolve the discrimination by means short of fund termination have failed.

Do you find that after *Grove City,* not only have you had to drop cases, but perhaps your ability to influence the educational institutions has been hampered as well in trying to reduce the likelihood of discrimination?

Mr. **Bell**. Oh, yes. I think that's so. Now, most of the institutions, the great bulk of them are complying with the law and they're doing it with a full heart, if I could use that expression. But there are those that are more combative. Right now there are those that say you can't even come on the campus and some of those were in that list of 18.

There the institutions, if you can't even come on the campus, you don't have a way to trace the funds in question.

Senator **Hatch**. The Senator's time is up. Senator Mathias.

Senator **Mathias**. Thank you, Mr. Chairman. Mr. Secretary, it is a pleasure to see you here.

In another matter, the question of the position you had taken in the *Grove City* case was before this committee. At the time that Mr. Meese's nomination to be Attorney General was being considered by the committee, there was some reference to a meeting that you had had with Mr. Meese and with others at a time when the *Grove City* case was pending. Do you recall such a meeting?

Mr. **Bell**. I have had several discussions at the White House with White House staff. So I don't know what specifically there, Senator Mathias, you are referring to. And, of course, we discussed this and we discussed the *Grove City* brief at the time that it was filed.

Maybe some reference to that.

Senator **Mathias**. Well, apparently, this was prior to the circuit court decision in *Grove City*. I don't have the transcript before me, but as I recall, your position was represented as being that receipt of Federal financial aid by the Grove City students didn't equal aid to Grove City.

Mr. **Bell**. Senator——

Senator **Mathias**. Therefore, title IX, of course, would not apply.

Mr. **Bell**. Yes; I took the position—and keep in mind, I am not trained in the law—I took the position——

Senator **Mathias**. You may have an advantage over us.

Mr. **Bell**. I at least was expressing the hope that the Grove City's that scrupulously avoided taking any Federal money, that all they did was admit a student who, on their own, applied under the alternate disbursal method and got a Pell grant in the mail, they would receive a Federal check and deposit it in their own account. I was hoping that this would not be found to be Federal financial assistance to an institution.

But those that are learned in the law said there's no way you can construe the statute to read that way, and so I lost in that discussion. It wasn't on the part of others that wanted to stretch it to cover them; it was just their dispassionate reading of the law as they saw it.

But I couldn't see how we could construe that to be more than assistance to that individual who independently applied for and received the Pell grant.

I distinguished it even from the Pell grant that the institution disburses where they receive a large sum of money from Dr. Elmendorf's office and acts as our disbursing agent. They get administrative money for doing that, and as I said before, I think some of them earn some interest on that money, on the float while it's there and being disbursed.

Even the Grove City institution, and a few like it, just a handful, have refused to do that. They haven't wanted to touch a Federal dollar, and I wanted to respect their fierce desire to be independent. I can't find any instance of discrimination on the Grove City campus. It's a splendid institution.

So I wanted to respect that, but at the same time, I felt that if the college received any Federal assistance, then it should cover the entire institution.

Now, that's the way in my years in education we had interpreted the statute. But the Supreme Court raised that first in the *North Haven* case, not the Justice Department. The Supreme Court raised that in *North Haven*, and then following that, the *Grove City* brief was filed, and, as you know, the decision subsequently made.

But that may be the instance you're referring to.

Senator **Mathias**. I think that is. It's whether the aid to an individual student would trigger title IX coverage or would spread the blanket of title IX.

Mr. **Bell**. I didn't feel that it would, but those that studied the legislative history and read the record of the hearings and so on came up otherwise, and that part of it the Supreme Court unanimously agreed to. So it shows you how far off I was in reading the law with an education degree.

Senator **Mathias**. Just to explore your thinking on it a little further, was it your thinking that there had to be aid to a substantial number of students, or a majority of students? Or would it be your thinking that individual aid to students was in itself immaterial and it had to be to the institution?

Mr. **Bell**. No; I felt that if the institution received a Government check, and deposited it in their accounts, that that was aid to the institution. And I also felt that that whole institution was then covered.

I construed the program or activity to include the entire educational program. Now, I was wrong on that; the Court found it otherwise. I wondered why those of you who wrote the legislation—and perhaps you weren't involved in that—I wondered why they ever used that phrase in the first place.

But the Supreme Court rule that way. But I felt though, that the difference was whether or not an institution received a Government check and deposited it in their account. That's different from my applying as an individual citizen, getting a check in the mail that I'm entitled to get from my Government, and depositing it in my own account, and then going about paying my tuition and other expenses.

And that's where I wanted to make the distinction. But the number of students wouldn't matter. It's whether or not you received a Government grant; either a letter of credit that draws funds into your treasury or a check that you could deposit into your treasury as an institution. And if that happened, I felt you were covered, and it wouldn't matter how many students were involved.

And I think that's the way most of the educators and school administrators and college presidents that have worked out in that arena where I've been, have interpreted it. We did that for years until we got up to this decision from the Supreme Court.

Senator **Mathias**. When you talk about legislation overturning *Grove City*, you're not talking about that particular aspect of the case.

Mr. **Bell**. No.

Senator **Mathias**. Which was a 9–0 decision of the Supreme Court.

Mr. **Bell**. That's correct. I was just expressing the hope, and I guess my own personal sorrow that Grove City can't remain independent. Because they've worked so hard, they've sacrificed so much, Senator Mathias, not to take any Federal money.

It's a big sacrifice to refuse to take the campus based aid. Just look at the private institutions that take it. And wish that it was more.

We use the quip—they say that Federal money is tainted—"it 'taint enough". [Laughter.]

And that's the attitude of many of the private institutions. But there are a handful that want to stay independent. They say we can go it alone.

Now, you can say, well, what about them, suppose they discriminate? Well, if our intent is to say if you get Government aid, you've got to comply; if you don't get Government aid you don't have to comply. Then that's where I'd like to see it drawn.

But that's how I felt about Grove City. I respect that institution very much. It's a splendid, small liberal arts college.

There are two or three around that probably would emulate Grove City, and then they'd discriminate. But if we have to say that the test, as to whether or not you have to comply, is whether or not you're getting Federal aid, I would apply the test of whether or not you get a Government check or a Government grant; not whether you would admit somebody who went out and applied for an indirect form of aid, deposited it in their own private account, and then used that money along with their own money for tuition or other purposes. I think that's a matter between the individual, as a private citizen, and their government. When it's a matter between the institution and the Government, if they get any aid, then I would say they're covered, and the whole program or activity is the entire campus.

Senator MATHIAS. As in so much of life, this becomes a matter of degree. If a significant number of the students depend for a significant amount of their subsistence on this kind of aid, then, in fact, the institution is dependent on it, whether or not it passes through the students' private bank accounts or whether it comes directly.

Mr. BELL. Yes, and Senator, I think that's the way the Supreme Court read it, and I would have to say as I express my wish or my hope, that we could respect those institutions, I know there is that practicality about it.

Senator MATHIAS. Thank you, Mr. Secretary.

Senator HATCH. Secretary Bell, I am considering an amendment, an extremely narrowly focused amendment, which would clarify the effect of so-called indirect assistance upon a very small number of private independent colleges such as Grove City College and Ricks College, whose presidents testified last week.

This amendment would not apply to vocational or trade schools, but only to traditional 4-year or 2-year colleges.

Any such institution which received absolutely no direct campus-based assistance and had as their only connection with the Federal Government the fact that attending students themselves received ADS Pell grants, or GI benefits, or some other form of indirect assistance, only those schools would be exempt from the massive body of title IX rules and regulations and paperwork requirements. In other words, this amendment adopts the premise that *Grove City* ought to be overturned; it takes the same position that you've taken here that coverage under title IX ought to be institution-wide. I agree with that.

What it does at the same time, however, is clarify that the mere fact that a student receives a GI benefit does not constitute the kind of assistance that triggers title IX coverage upon a college or university itself.

I would estimate that there would be a mere handful of small colleges that would fall within that particular provision should it be adopted. I am unaware that any of them is any different than Grove City College or Ricks College or Hillsdale College or has engaged in any exercises and discriminatory conduct of any particular kind.

Would you be willing to support a provision establishing this extremely limited refuge from the full weight of title IX rules and regulations and paperwork?

Mr. **Bell**. Yes; I could say that I would be willing to support that. I don't know how my colleagues at Justice would feel about it, but speaking for myself and for the views that I was expressing to Senator Mathias, such a provision would please me very much. That's where I think we ought to come down.

Senator **Hatch**. OK, let me ask you another question about title IX. Section 901 presently contained a partial exemption for those private colleges which are religiously controlled to the extent that their religious tenets conflict with the dictates of title IX.

As Bruce Hafen, the president of the Association of Presidents of Independent Colleges testified last week, such conflicts can, and have arisen in the context of abortion policy, dormatory rules, dress codes, counseling practices, and so on.

President Hafen also observed that this exemption was excessively narrow in that it applied only to a handful of colleges which were formally controlled by a church and that most religiously grounded schools did not fit into that particular category.

What would be your attitude towards an amendment slightly broadening this exemption, in other words, allowing a partial exemption for any college which could demonstrate an honest conflict between their religious tenets and regulations of title IX.

Mr. **Bell**. We would like to look at the proposed language. I would say the concept I could support.

Especially, Mr. Chairman, if it maintained the status quo of what we've had with respect to title IX, which I know and acknowledge has a religious exemption there. But it is very, very restricted. That's why I'm qualifying my reply. I would hope it would stay that way.

Senator **Hatch**. I think you, like these college presidents, would appreciate the potential for conflict between religious beliefs and certain provisions of the title IX regulations.

If we could eliminate indirect Federal assistance as a predicate to title IX coverage for nonvocational schools, in your opinion approximately how many schools would be affected?

Mr. **Bell**. I would guess, and I would hope you wouldn't—I would need to be able to amend this, but I would guess—what, Dr. Elmendorf, maybe 50?

Mr. **Elmendorf**. The difference between the number of schools that are traditional four year public and private schools would be around 4,200. We have over 7,000 institutions now receiving Pell grant aid. Many of those are proprietary schools, schools of nursing, cosmetology and your religious affiliate schools would probably fit more in that category——

Senator HATCH. Fit more in what category.

Mr. ELMENDORF. In the category of proprietary institution.

Senator HATCH. How many would there be?

Mr. BELL. That are academic and not vocational in nature?

Senator HATCH. That's right.

Mr. BELL. It would be my guess, and I may have to retreat from that, around 45 or 50. Maybe we could supply that for the record.

Senator HATCH. 50 out of how many in this country?

Mr. ELMENDORF. 4,000.

Senator HATCH. So in other words, if we could agree in this committee to exclude those 50 because they don't take direct aid, we'd be covering 50 out of 4,000 schools. We could then resolve this conflict.

Mr. BELL. Right.

Senator HATCH. Is there any evidence that these 45 to 50 schools discriminate presently?

Mr. BELL. Not that I'm aware of. Usually where you have that, you get a complaint filed. We've had a couple of them and they've been quite celebrated cases. But none that I know of now.

Senator HATCH. You don't know of any instances in regard to Hillsdale or Grove City or Ricks, to take the three that testified?

Mr. BELL. I don't know of anything there.

Senator HATCH. The three college presidents were also unanimous in their view that their donor bases might be eroded as their institutions and other private institutions lost some of their distinctive identities. Do you have any perspectives with regard to these claims by these three college presidents?

Mr. BELL. Well, I think they would to some extent. We talk about Grove City a lot here.

Senator HATCH. You say they would, you mean their donor bases could be eroded?

Mr. BELL. That's correct. I think part of the reason they get their assistance in the private sector is because of that. I know that's so with Grove City.

Senator HATCH. Has the Department of Education recently reviewed its title IX regulations, or does it plan to do so in light of the possible changes effected by S. 2568? What I'm asking, in other words, is whether the substance of those rules and regulations might not have to be carefully reviewed and reassessed in view of the institution-wide coverage that might be generated by this particular bill. Just to give you an example, there are at least four separate title IX rules relating to abortion policies for covered schools. No one has focused too much attention on these provisions largely because of the fact that title IX was considered program specific. To the extent, however, that title IX is transformed in this respect, I would imagine that there would be a quantum leap in interest in these provisions.

So what are the plans of the Department if the present legislation is enacted unamended?

Mr. BELL. Mr. Singleton, you've been reviewing our regulations and we were in the process of that with Grove City. Would you respond?

Mr. SINGLETON. Mr. Chairman, without a doubt we would have to not only review our title IX regulations, but title VI and section

504 as well to make sure that all of the conforming changes were, in fact, made.

The present language in the proposed legislation contained some definitions and so forth that we would have to trace through and make sure that existing regulatory schemes would apply.

Senator HATCH. Mr. Secretary, is it your understanding that if $1 in Federal assistance went to the biology department at the University of California at Riverside, for example the provisions of S. 2568 would apply title VI and title IX to every department of the University of California at every one of the 14 or so branches throughout? Is that correct?

Mr. BELL. I believe that the probabilities are strong that in some of the district courts it would be read that way.

Senator HATCH. My time is up. Do you have any more questions, Senator Kennedy?

Senator KENNEDY. Well, Secretary Bell, you've indicated, very compellingly that it has been your understanding as an educator, that the law was that if a university received some financial help and assistance, limited as it might be, that the whole university was covered.

Mr. BELL. Yes.

Senator KENNEDY. As I understand it, the Supreme Court in the *Grove City* case didn't really have much difficulty in reaching the decision, based soundly on past precedents that even indirect aid was Federal aid and assistance.

My understanding from your testimony today is that you would look at it differently from a personal point of view, but you're not trying to make the case to reverse the Supreme Court's holding that indirect student aid is Federal financial assistance. Am I correct in that?

Mr. BELL. That's correct. There are so many attorneys whose views I respect who came down opposite from the hope and the wish that I was expressing to Senator Mathias, that I have to conclude that.

I would emphasize, Senator Kennedy, that traditionally we've looked at each institution as being responsible, as you talk about the whole university. We've looked at an institution in the context of a university.

Now, we have some multicampus institutions, but we've held them accountable for compliance on an institution by institution basis. Now, the 14 campus University of California system, we've not looked to them to comply. If there's a violation, we transact our compliance review with UCLA—not with University of California at Berkeley. And it would be the same with the Massachussetts higher education system, where you have one board of regents and quite strong centralized control. We deal with the University of Massachusetts at Amherst, and not the other institutions that deal with them. And we hold them accountable.

And we think that the way the statute is now drafted that at least some of the Federal judges, that at least there is a hazard that they would construe this in a way that would spread it out over all of it. And those are the kinds of things I would hope we could correct here.

Senator **Kennedy**. Am I correct—I'd just ask counsel—that in terms of your advice to the Secretary, that indirect aid would be considered to be an aid to the institution. Was that your recommendation to the Secretary on this issue?

Mr. **Bell**. Senator, we don't have our general counsel here. He is the Assistant Secretary for Civil Rights, although he is an attorney.

We can get our general counsel to respond for the record.

Senator **Kennedy**. That would be fine.

Thank you, Mr. Chairman.

Senator **Hatch**. Thank you, Senator Kennedy.

I have one other question, and that is this: When you are talking in terms of working together to modify and correct this bill, I take it you are referring only to those areas within your range of expertise as Secretary of Education and not all the other matters I mentioned in my opening remarks.

Mr. **Bell**. Yes; just as it relates to education. I would be totally incompetent on the other areas; Justice has the overall responsibility. I would just emphasize, as it applies to education and our day to day experience in dealing in the education arena, we think we could be helpful.

Senator **Hatch**. As title IX has shown itself to be beneficial to women across this country, my women's advisory group in Utah came to me and said we'd like you to consider withdrawing your limiting bill because we think title IX has been beneficial to women. They made out a very good case; I did a lot of investigation, and I withdrew my limiting bill. I agree with you that title IX should apply to the whole institution. But I do have these questions of concern about institutions like the ones who have testified here today who really are fiercely independent.

Mr. **Bell**. Right.

Senator **Hatch**. With respect to our exemption, we are talking about less than 1 percent of all educational institutions, and fewer than 1 percent of all students in such institutions.

Mr. **Bell**. I would just comment, Senator, if I could personalize this, that my own wife is a strong supporter of title IX, and it grows out of her experience in school. She was good at sports and wanted to participate. She wasn't able to. And she says there's not much of a difference between saying, well, you can't participate in athletics because you're a woman, and saying you can't participate in athletics because you're black or Hispanic or something else.

So there are a lot of women who have those strong views.

Senator **Hatch**. And I happen to be a convert. I happen to agree with them. I really think it has proven to be beneficial.

I might mention also that Hillsdale College, for example, was the second college in the history of this country to admit women.

Mr. **Bell**. Yes.

Senator **Hatch**. And it has a long, effective record of being fair, and nondiscriminatory.

Be that as it may, I appreciate your testimony here today. I think it's been very helpful to the committee. Let's hope that we can resolve some of these very important conflicts.

Thank you, Mr. Secretary.

[The prepared statement of Hon. Terrel H. Bell follows:]

PREPARED STATEMENT OF T. H. BELL

The Secretary is accompanied by

Harry Singleton, Assistant Secretary for Civil Rights
Edward Elmendorf, Assistant Secretary for Postsecondary Education

Mr. Chairman and members of the Subcommittee, I appreciate the opportunity to testify on S. 2568, the Civil Rights Act of 1984.

This legislation could have a tremendous impact on all phases of civil rights activity in this country, and I'm hopeful that the spirit of deliberation and thoughtfulness that has marked the Senate hearings thus far can be extended through the markup, floor debate, and conference work on the bill.

I emphasize at the outset that with the benefits and privileges of Federal aid come certain responsibilities, primary among which is the duty to ensure that those funds are not used to support discrimination in any way.

In the course of the debate on this bill it has been suggested by some that this Administration is somehow less committed to this principle than its predecessors. I want to make it clear to the members here, to the public, and to people within the educational community that we will continue to act quickly and forcefully to take appropriate enforcement actions against discrimination. To this end, we would welcome and can support enactment of legislation that would broaden the narrow civil rights coverage generated by the Supreme Court's Grove City decision.

As this Subcommittee knows, the Department of Education's Office for Civil Rights has closed 18 higher education cases and 4 elementary and secondary education cases because of the Grove City opinion's construction of the term "program or activity" in the civil rights statutes. I want to state that we will take every possible step to reopen these cases upon the enactment of legislation that deletes the "program or activity" limitation.

Thus, we all, I believe, have a common goal. As we read the congressional debate and testimony, there is no policy difference between the Administration and the sponsors of S. 2568 on the goal to return the civil rights laws coverage to its status before the Supreme Court's Grove City decision.

However, we are concerned about ambiguous provisions in S. 2568 which we fear will lead down the road to expansive judicial interpretations that were neither intended nor perhaps even foreseen by the sponsors of the bill. Of greatest concern to us is new language in the bill's definition of "recipient." It has been stated by some witnesses that the language is essentially identical to that in the existing civil rights regulations and that, therefore, the scope of coverage will be identical to the pre-Grove City situation. The bill is not identical to those regulations.

First, the final clause of the definition of recipient indicates that "recipient" includes any entity "which receives support from the extension of federal financial assistance to any of its subunits." This language is not in any of the existing regulations. Moreover, the bill does not define the term "subunit" or what constitutes "receiving support." How will the courts interpret this new language?

Under our postsecondary programs will aid to a particular campus of a multi-campus university result in coverage of the entire university system, including all of its campuses? If so, the bill expands pre-Grove City coverage. Would aid to a State educational agency or local educational agency subject all agencies and subdivisions of the State to coverage on the theory that the aid indirectly supports the State? These are only some of the difficult questions that courts would have to decide.

Second, the bill adds parenthetical language providing, in effect, that aid to an entity includes aid to its subunits. Under the existing regulations, subunits of particular educational agencies already would be covered. The new language may be interpreted to expand coverage by extending it from one public agency to another, particularly in the case of programs administered by other Federal departments.

Lastly, the bill deletes "ultimate beneficiary" language from the definition of "recipient" in the existing Title VI and Section 504 regulations. This omission could leave open the possibility of some of the "worst case" scenarios regarding individual Pell Grant, food stamp, or social security recipients which have been raised in the course of recent House and Senate hearings. Although testimony before this Subcommittee suggests that this problem has been remedied by the deletion of "individuals" from the definition of recipient, we do not believe "individuals" should be deleted from the definition because they are eligible for project grants under some of the Department of Education programs such as the Women's Educational Equity Act.

Let me be clear that I'm not predicting that S. 2568 as currently written would have all these effects. But I don't believe that anyone, including the members of this Subcommittee, can give any reasonable assurance that it won't. Sponsors of the bill emphasize that their only intent is to restore pre-Grove City civil rights coverage and maintain that courts would heed that intent. But they acknowledge that we need this bill because the Supreme Court misunderstood Congress' original intent in enacting Title IX.

Common sense tells me that when Congress adds new language that changes a long-standing statute or regulation, it naturally would be assumed that the change will, in fact, effect a change in the law. It can't be denied that S. 2568 changes and adds to the definition of recipient in the existing civil rights regulations. Those changes raise significant ambiguities.

In effect, S. 2568, because of these ambiguities, sends the issue of the scope of civil rights coverage back to the courts. Under the bill, it is the 500 federal district court judges, the 140 circuit court judges, and the Supreme Court that will determine just how far these laws extend. The language of S. 2568, by going beyond the existing regulations, opens the door for the courts to make expansive interpretations of the coverage of the civil rights statutes in ways that overstep commonly accepted notions of federalism. And, no matter how the courts ultimately come out, the bill surely will result in increased litigation and in uncertainty for public and private agencies that need to know the extent of their civil rights obligations. In my conversations with dozens of representatives of the higher education community, one thought has overshadowed all others--the need for uniformity and certainty in the application and enforcement of these statutes.

Mr. Chairman, I don't believe that there are irreconcilable differences with this bill that can't be worked out. I do believe that we can draft a bill that will remove the concerns of the Grove City decision and maintain an effective civil rights policy in the years to come, but which will avoid the sweeping legal implications of vastly expanded federal involvement in State, local and private affairs.

Mr. Chairman, I appreciate the opportunity to present some of our concerns today. The Department is more than willing to assist you and your colleagues on this matter, and I'd be happy to answer any questions you might have.

Senator HATCH. We will now call on Mr. William Bradford Reynolds of the Civil Rights Division of the U.S. Department of Justice.

Mr. Reynolds, we're happy to have you here today. You may proceed.

STATEMENT OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. REYNOLDS. Thank you, Mr. Chairman, members of the subcommittee. I welcome this opportunity to be here this afternoon and present the views of the Department of Justice on Senate bill 2568, the Civil Rights Act of 1984.

Let me preface my remarks on the proposed legislation by stating first my personal intolerance and the abiding intolerance of the President, the Vice President, the Attorney General, and every other member of this administration toward discriminatory conduct, in whatever form——

Senator KENNEDY. Mr. Chairman, is it the plan of Mr. Reynolds to read this whole statement? As I understand it, we have just received it.

Senator HATCH. He can do whatever he wants to do.

Senator KENNEDY. Well, I think there is a rule of the Judiciary Committee to get the statements in 24 hours before. In being fair to the Justice Department's testimony, there is that rule. As I understand from staff, we've just received it. I just want to know if we're going to plow through it. I am just concerned that we spend our time most constructively.

Senator HATCH. It might be helpful to read it if we've just received it.

With one exception here today, every witness has failed to abide by that rule. I myself am upset about that. But be that as it may, Mr. Reynolds is no exception.

Senator KENNEDY. Perhaps we think the Justice Department that knows of this rule, and has the primary relationship with this committee might try and set an example by complying with it.

Senator HATCH. Well, I think it would be well for all witnesses, including the Justice Department, to have their testimony in in advance.

However, this is nothing new. You've testified before up here. To the extent that your testimony is new, I would appreciate you highlighting it in your remarks. But whatever you desire to do, I hope you can summarize, because we have a long list of witnesses.

But I will be pleased to listen to whatever you decide to do. I think your testimony is extremely important here since you represent the Justice Department and have had to deal with these issues for all of the time you've been in Government service. And I think you've had some of the hottest potatoes to handle in this Government.

So I want to show great deference and respect to you which I expect everybody else to do as well.

Go ahead.

Mr. REYNOLDS. Mr. Chairman, thank you. Let me apologize. I am sorry that I did not get this up earlier. We tried to get it to the subcommittee earlier and were unable to.

Senator HATCH. I was always late with briefs, too.

Mr. REYNOLDS. I think that I can go through this and leave out some parts so we don't have to go through it all, but in view of the fact that committee members have not had a chance to read it beforehand, it might be helpful for me to cover some parts of it so that you'll have a full understanding of the Department's position in this regard.

The nondiscrimination principle—embodied in the ideal of a Nation blind to color and gender differences—is at the center of America's historic struggle for civil rights. In that tradition, ours has been a profound and unwavering commitment to ensure every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer, no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth.

Whenever that legal and moral command has been compromised by discrimination—whether for reasons regarded as benign or pernicious—the administration has been quick to bring the full force of the law against the discriminator.

There is another principle that this administration has been every bit as vigilant in protecting, the principle of federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom.

We have, therefore, resisted unnecessary and overly intrusive expansion of Federal power, particularly when the Federal intrusion unduly impedes State and local governments' efforts to deal effectively with regional and local problems that most directly affect the citizenry at the State and local levels.

As Senator Hatch noted in his statement regarding Senate bill 2568, the bill being considered by the committee, as currently drafted poses a tension—in my view, an unnecessary tension—between these two important principles of equal opportunity and limited Federal involvement in State and local affairs.

That in itself is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement.

The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes bring into focus the tension I have mentioned.

Heretofore, however, Congress has undertaken—through thorough and extensive deliberations, comprehensive hearings, open and rigorous floor debate, and the amendment process—to ensure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the need, based on congressional findings, for strong Federal protections against discrimination—that is, the Voting Rights Act of 1965—but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives—that is, the Revenue Sharing Act of 1972.

We join with Senator Hatch and others in urging Congress to put the Civil Rights Act of 1984 through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate—in committees and on the floor of the House and Senate—that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short circuited.

THE GROVE CITY DECISION

S. 2568 has been offered as a modest amendment of existing statutes, intended not to break new ground, but only to overturn the Supreme Court's recent decision in *Grove City College* v. *Bell,* 104 S. Ct. 1211 (1984), to the limited extent that the Court held title IX of the Education Amendments of 1972 to be program specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education "program or activity" receiving Federal financial assistance. The Supreme Court in *Grove City* ruled that a college which enrolled students receiving basic education opportunity grants—Pell grants—was subject to title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college—in this instance, the student aid program.

Much has been said since *Grove City* about the Court's so-called new interpretation of title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of title IX as program-specific legislation altered the state of the law.

Simply to set the record straight, I would point out that the Court's programmatic reading of title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute—one contemplating institutionwide coverage of title IX—the fact is that, before *Grove City,* every court of appeals except the third circuit in the *Grove City* case itself had construed title IX to be program specific in coverage. Indeed, as to the parallel Federal funding statutes dealing with race discrimination, title VI of the Civil Rights Act of 1964, and with handicap discrimination, section 504 of the Rehabilitation Act of 1973, they, too, had consistently been interpreted by the Federal appellate courts as program specific.

Thus, testimony provided to this committee regarding, for example, the dramatic strides made by women in college athletics since title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in *Grove City* simply directed the third circuit court of appeals to get in line with existing judicial authority in this area, including earlier Supreme Court precedent.

While we may differ with those who suggest *Grove City* departed from prior judicial precedents of title IX, we do agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to title IX that will change its programmatic coverage to institutionwide coverage. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the *Grove City* decision.

Nor would it be inappropriate, in the Justice Department's view, if Congress should find the need for it in these and other hearings to broaden in similar fashion coverage of the parallel antidiscrimination funding statutes that deal with race, handicap, and age.

That is, as I understand it, precisely what Congress has in mind.

Based on that assumption, let me make it unmistakably clear, the administration's concern with S. 2568 lies not with the stated purpose of its sponsors, but only with the overly expansive language selected to reach the desired end. In the name of doing no more than restoring title IX to institutionwide coverage and providing a similar interpretation to three parallel statutes, the Senate has introduced a bill in S. 2568 that by its terms goes far beyond the limits set for it by its sponsors. Let me explain.

DEFINITION OF "RECIPIENT"

By deleting the phrase "program or activity" from the existing statute and substituting in its place the word "recipient," S. 2568 prohibits discrimination under the four statutes by any recipient of Federal financial assistance, rather than barring only discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of recipient that is said to be drawn from existing regulatory definitions of that term under title VI, title IX, and section 504. There are, however, notable differences.

A recipient, as used in the existing regulatory scheme is subject to coverage only as to its funded programs or activities. By contrast, under S. 2568, a recipient is to be covered in its entirety. Beyond that, the bill's definition of recipient does not track any of the present regulatory definitions, but makes additions and deletions that expand the scope of coverage.

Thus, there is added at the end a new clause "or which receives support from the extension of Federal financial assistance to any of its subunits," while the regulatory exemption for ultimate beneficiaries has been deleted.

There is, admittedly, ample room for debate as to the exact breadth of the bill's language. No definition of received support is included in the bill; other terms remain undefined. Thusfar, statements by the sponsors and by witnesses at these hearings have left unclear the true legislative intent.

At a minimum, it seems that the term recipient is at least broad enough to ensure coverage of an educational institution where Federal funds are provided to one or more of its programs or activities. Thus, the Supreme Court's programmatic interpretation of title IX in *Grove City* would be overturned.

It appears, moreover, that the definition of recipient would also reach all campuses of a multicampus university if any Federal funds went to just one campus, or to students through a Pell grant enrolled at only one college campus.

Also, Federal funds going to an undergraduate program would, under S. 2568, seemingly include all graduate programs within title IX coverage, even though there was no Federal financial assistance at the graduate level.

To suggest a narrower reading of the language on the ground suggested by a witness who appeared before you, David Tatel—that is, that the bill is designed only to "restore" title IX coverage to pre-*Grove City* interpretations, and those interpretations never went so far—is to ignore that S. 2568 is a different statute using different language under different circumstances. Small comfort can therefore be derived from past agency interpretations of a markedly different piece of legislation.

The scope of the present bill will unquestionably be determined by its language and its legislative history, not pre-*Grove City* activities. And that is why it behooves Congress to insist that the language of the bill accurately reflect the bill's purpose. Otherwise, the Supreme Court will once again, as it did in *Grove City,* be forced to tell Congress that the law it passed fails to do what Congress intended for it.

What, for example, is the intended scope of coverage under S. 2568 with respect to a college or university's commercial property? Rental property occupied by students or faculty would seem to be covered. But also within the reach of the broad recipient definition could well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the noneducational enterprise receives support from the college or university that is in some aspect extended Federal financial assistance.

Nor does that necessarily define the outer limits of coverage. As S. 2568 is written, when Federal financial assistance is extended to a "subunit"—not defined—of a larger "entity"—not defined—the larger entity itself—whether it be public or private—can be viewed as the "recipient" if it is deemed to have "receive[d] support from"—not defined—the Federal funds going to the subunit.

While Senator Dole and others have testified that this language is intended only as a "limited exception," other witnesses seem to regard it sufficient to meet the "receives support" standard if the Federal financial assistance to a subunit "frees up" non-Federal funds to be used elsewhere.

Indeed, I might note that Senator Cranston has advanced this interpretation in a statement he made when this legislation was sponsored.

Courts thus could conclude on such a theory that if a Federal agency extends Federal assistance to a State university system, all other State departments or agencies—whether or not they are educational or perform an education service—would be brought within the coverage of the four statutes, since the State "receives support" from the Federal assistance to the university system.

The clear contemplation appears to be that Federal agencies will be able to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

In addition, under the proposed definition of "recipient," if the large entity receives Federal financial assistance, all subunits are swept within the coverage provision—whether funded or not and whether or not they "receive support" from the funding.

Thus, a Federal block grant to the State for educational purposes could likely bring all political subdivisions of the State under the civil rights oversight responsibility of the Federal Government, since there is no State that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under S. 2568 seems to be virtually complete. And, the bill would apply in similar fashion and with equal force to private commercial ventures and enterprises.

Moreoever, all successors and assignees or transferees of a recipient become, under S. 2568, recipients in their own right, as does any entity to which Federal funds are extended "* * * through another entity or a person."

Thus, the bill could be construed so that Federal Food Stamp Programs, would subject participating supermarkets and local grocery stores to Federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare and medicaid programs could also be recipients, as could the "transferee" of an individual's social security check, who upon acceptance of such payment, would have—albeit unwittingly—signed an open invitation to Federal enforcers to enter and investigate.

While Senator Dole and others have testified that this is not the intent, the bill's language simply fails to preclude so broad a reading. It may well be that individuals receiving Federal funds escape coverage, but, as I have already indicated, the express protection against coverage afforded by the existing regulations to "ultimate beneficiaries" of Federal aid—such as farms, for example, under certain Department of Agriculture grants—was not carried over in the statutory definition of "recipient." Thus, the bill is in fact susceptible to the broadest possible interpretation.

ENFORCEMENT PROVISIONS

In addition to expanding the substantive coverage of the nondiscrimination funding statutes, S. 2568 also substantially alters—albeit again without any degree or clarity or precision—the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes. Federal agencies would enforce either by fund termination by the particular Federal funding agency or by referral to the Department of Justice for litigation; private parties would continue to have a private right of action. The scope of these enforcement mechanisms is measurably expanded, however.

As to the fund termination provisions, S. 2568 replaces the current "pinpoint" language—which limits fund termination to the particular program that has been discriminatorily conducted—with new language providing for termination of "the particular assistance which supports" the discrimination. The ambiguity introduced by this "supports" phrase opens the way for possible interpretation of the four statutes that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the Federal funds going to it provide "support" for another nonfunded program involved in unlawful discrimination.

The new termination provision also admits of the argument that any Federal assistance which goes to the entity as a whole necessarily "supports" the discrimination of the component parts and is thus invariably vulnerable to fund cutoff.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes, unambiguously requires the more modest fund termination remedy, and there would appear to be no good reason to alter this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by S. 2568. The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress, whether so open-ended an invitation to private attorneys to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impede civil rights enforcement, as so expanded by S. 2568.

ADMINISTRATIVE CONCERNS

Nor can one overlook the series of administrative complexities that S. 2568 presents to the Federal agencies. Agency regulation and paperwork requirements imposed under the four existing Federal civil rights statutes are currently onerous in many respects.

S. 2568, which would give all funding agencies authority—indeed, the statutory responsibility—to regulate all programs, activities and subunits of a recipient, will remove existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and to impose regulatory requirements.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provisions would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the Federal funds "supported noncompliance." No attention appears to have been given to this set of complexities by the drafters of S. 2568.

Nor has attention been paid to 26 Federal statutes that make specific reference to title VI, title IX, section 504, or the Age Discrimination Act. Several of these statutes, including the Revenue

Sharing Act and the block grants contained in the Omnibus Budget Reconciliation Act have broad impact. The drafters of S. 2568 have not indicated what effect passage of the bill would have on the implementation of these program-specific statutes.

CLOSING REMARKS

The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted. If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal Government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age, and handicap, such a legislative undertaking should be carefully considered, fully debated, and cautiously constructed.

It may well be that Congress could conclude that legislation of this sort is in the Nation's best interests, but such a decision should be made fully cognizant: First, that the additional costs of Federal enforcement under a bill as comprehensive as S. 2568 can be staggering; second, that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely expanded; third, that the paperwork requirements can only increase—and probably dramatically; forth, that with the new legislation comes considerable litigation, leaving the law unsettled for some years; and fifth, that whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of Federal funds to States so that, as "recipients," States "can knowingly decide whether or not to accept those funds" as so conditioned.

The Department of Justice's review of the foreseeable effects of S. 2568 convinces us that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the *Grove City* decision—broader, indeed, than extending institutionwide coverage under title IX to race, age, and handicap discrimination as well.

The perhaps unintended ramifications of the bill are certain at best to create confusion in recipients, agencies and courts. At worst they may include unwarranted interference with important State prerogatives and even lead to adverse judicial decisions as to their enforceability.

It is therefore important to tailor S. 2568 to its stated purpose and to carefully craft the proposed bill with full attention to the complexities of the undertaking. This can be achieved, in the Justice Department's view, with some modification of the proposed definition of "recipient," and a return of the "pinpoint" provision, the fund cutoff provision, to its pre-*Grove City* status.

In addition, the committee might want to consider using the approach to coverage for State and local governments that was adopted by Congress in the civil rights provisions of the Revenue Sharing Act.

The Federal funds under that statute go to municipalities without being earmarked for particular use. A presumption attaches that the Federal financial assistance is provided to all municipal programs and activities unless the city can show, by clear and convincing evidence, that a particular department or service received no Federal funds.

If a similar rebuttable presumption existed under S. 2568 for State and local funding, the bill's coverage, while still generally applicable to States and localities, would be far more manageable as an enforcement matter.

The Department of Justice stands ready to work with the committee on these and other modifications of S. 2568 so as to align the bill more closely with the stated objectives of its sponsors.

It is critically important that legislation of this sort be drafted in precise, clear terms that leave no room for speculation as to its reach and application.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Reynolds. Your complete statement will appear in the record in its entirety.

There seems to be quite a bit of disagreement over the fundamental issue of whether the proposed bill does or does not alter the status quo prior to the *Grove City* decision.

How would you account for this state of affairs on the threshold question here? Is each side simply reading the existing cases differently? Or are they reading different cases altogether? What's the problem here?

Mr. REYNOLDS. I think there was a dichotemy prior to *Grove City* between what some of the agencies and the courts were regarding as the interpretation of the statute. The enforcement activity of some of those agencies, I think, as a general matter was broader than the court said it should be; hence, the dichotemy between the agency action and what the courts were saying was the proper interpretation of the statute.

What I think this Supreme Court pointed out is that the judicial interpretation, that has been consistent since passage of these acts, says that Congress used "program or activity" with the knowledge that it was limited to programmatic coverage. That interpretation is the one that adheres to a statute that's written in the way that title IX is written, and those agencies that were proceeding on the assumption that there was a broader interpretation, were not properly reading the statute.

Senator HATCH. Mr. Reynolds, why is the administration so concerned with fine nuances of detail concerning public and private action or Federal and State action. What is wrong with a simple and well-understood public policy in which no institution, public or private, Federal or State is permitted to discriminate on such basis as race or color or sex? Why should any entity be permitted to discriminate? Why shouldn't we simply outlaw discrimination once and for all wherever it takes place?

Mr. REYNOLDS. Well, I think that discrimination, wherever it takes place, certainly should be outlawed; and I think that the existing statutory framework that we have goes far to do that.

The concern of the administration is that however broad Congress wants the reach of the Federal statute to be, it should do so with precision and in clear terms so that we don't have a situation where a vaguely worded statute carries the Federal Government into arenas that the State didn't contemplate when it accepted Federal funds, and where there has, at this juncture, been no need demonstrated by Congress for that kind of Federal enforcement.

We think that it is certainly Congress' job in the first instance to define how broadly the Federal reach ought to go, but it ought to do so with precision, and it ought to do so in a way that clearly meets a need that has been demonstrated in hearings of this sort.

Senator HATCH. Well, in addition, there is a need to maintain a distinctly private sphere anyway, isn't there? Isn't there a genuine need to maintain a distinctly private sphere in this country?

Mr. REYNOLDS. Were I making those kinds of decisions, I'd say that we have not, at this juncture, accepted the notion that the Federal Government is going to be the watchdog of all phases of private activity in this country. There is a private sphere, and there is a public sphere, and the lines are drawn pretty carefully by Congress. If legislation is going to move those lines, it ought to do so in a way that is fully sensitive to the private rights that exist under our existing legal framework.

Senator HATCH. Well, let me explore this bill with you systematically for a few minutes so we can better understand it. Let me raise this trickle-down concept in S. 2568 first.

Am I correct in my understanding that if a unit of government receives any assistance whatsoever from the Federal Government that every subunit of government is covered?

Mr. REYNOLDS. Certainly this statute would suggest that from the language that's been proposed.

Senator HATCH. In other words, if the State receives $1 in highway assistance, then every locality within the State is also covered by title VI or section 504, or the Age Discrimination Act?

Mr. REYNOLDS. I don't see that the statute contains any limitation that would suggest to a court that that is not a proper reading.

Senator HATCH. What precisely is the "subunit" of a private entity receiving Federal assistance?

Mr. REYNOLDS. Well, "subunit" is not defined, and I'm not sure exactly how one would define it. It is something the courts would have to sort out for us with a lot of litigation.

Certainly one would expect that you would include affiliates and subsidiaries of corporations. In the banking community, that subunit could be correspondent banks—branch banks and affiliates of banks for example.

In the farming industry I guess a subunit could be a subcontractor, of a farm enterprise, for example, and I think that one could speculate on a number of different areas that would be included.

I think "subunit" is a term, that because it's not defined, allows itself to include a number of smaller units.

Senator HATCH. So it would be expansive with respect to both the public and the private sectors under your view.

Mr. REYNOLDS. I think as the bill is written it doesn't suggest that public and private sector be treated differently. I don't see anything in the bill that suggests that it doesn't have the potential for expansion.

Senator HATCH. What is the present state of the law with respect to the trickle-down concept, particularly in the context of title VI?

Mr. REYNOLDS. Well, the law, as it is now, as you know, Mr. Chairman, is one that only covers the program that receives the

Federal financial assistance. The definition of recipient in title VI has a limitation which says that only the recipient's funded programs are covered.

Senator HATCH. So it's program-specific.

Mr. REYNOLDS. It's program-specific. So the question is not raised in that regard.

Senator HATCH. Let me consider, if I can, the trickle up concept in S. 2568. If a "subunit" of government or some other entity receives Federal assistance directly or indirectly, it is my understanding that the greater entity would be covered by the applicable statutes if it "receives support" from the assistance to the subunit.

Am I correct in that interpretation, in that standard?

Mr. REYNOLDS. That's the way the bill reads.

Senator HATCH. Well, looking at the dissent in *Grove City*, I am concerned that the idea of "receiving support" from the assistance to the subunit may be interpreted as nothing more than the fact that the assistance to the subunit displaced money that would have otherwise been coming from the larger unit, and hence, freed it up for any other purpose.

Now, is this a fair reading of the concept of "receiving support"?

Mr. REYNOLDS. Well, I certainly think that is one reading and it's one that has been suggested by a sponsor of the legislation. Defraying cost would be a sufficient basis to say that you received support. It's one that has been suggested to this committee by witnesses who have testified.

So, I think, given the language and given the suggestions with regard to the interpretation of that language by sponsors, as well as witnesses, that a court has certainly an ability to read it that way.

Senator HATCH. Let me ask you about the so-called tricklearound concept. Am I correct that the confluence of the trickle-up and the trickle-down theories might well result in the situation that, if a city receives 1 dollar in Federal sewer assistance, that every other municipality within the State would also be subject to coverage of the civil rights laws in question?

In other words, that assistance would first trickle-up to the State and then trickle-down to every other subunit of government?

Is there anything conceptually wrong with that argument? Is there any limiting factor that I'm overlooking here?

Mr. REYNOLDS. Well, I think that conceptually that will work—1 dollar is a little bit difficult—I'm not so sure how far it would reach.

Senator HATCH. Well, let's say——

Mr. REYNOLDS. But if one department in a city got a significant grant, then I think that, through the defraying cost theory, you certainly could say that it would trickle-up to the State and back down to, or over to, other State agencies or departments.

Again, I say that that is one interpretation. What we would be doing is instead of having Congress define the limits of this important statute, we would be leaving to the courts, through the judicial process, the responsibility of sorting through all those kinds of hypotheticals and telling us in various districts, and in various ways I suspect, how they would resolve them.

Senator **Hatch**. My time is up. But I don't see any conceptual limitations at all.

Mr. **Reynolds**. I think the way that it's worded, there are very few. That was the thrust of my testimony.

Senator **Hatch**. Senator Kennedy?

Senator **Kennedy**. Thank you very much, Mr. Chairman. Mr. Reynolds. I have been around here a long time, and have seen the tactics of those opposed to legislation who raise straw men or misinterpret and extend the language of the bill to such a degree as to misrepresent the purpose and the direction of the legislation. We on the Judiciary Committee try to ensure that the legislative language is going to be as precise as necessary to deal with the problem.

Having seen your testimony here today, and having read through the testimony that you gave over in the House, you indicate in a general way that you're not troubled by the direction of this legislation. You also indicate that you're troubled by various provisions of it, and yet, you have not come up with any specific recommendations about how to deal with it. You can't have it both ways. You can't come here and say that you're against discrimination in universities or age discrimination, or discrimination against the handicapped but you are opposed to this language to reverse *Grove City* that 63 Members of the U.S. Senate have been willing to put their names on.

A distinguished educator, Secretary Bell, has said that his understanding of title IX prior to *Grove City* was very much along the lines of the understanding of those that are cosponsoring this legislation.

And the attorneys at the Department of Education reach an entirely different conclusion about the application of title IX prior to the *Grove City* case, that the lawyers at the Justice Department, even though they have a high degree of competency in the particular area of education.

We're about to hear from a panel, members of whom have participated in a Republican administration and in a Democratic administration, who also reach an entirely different conclusion than you do about the application of title IX.

Now, who is out of step here? The 15, 18, 20 years of history, of understanding of distinguished educators like Mr. Bell, and others who have been in the Justice Department who we will hear from? Are they out of step and you are in step? Or are you out of step and are they in step with regard to this particular issue and this particular question.

You're very well aware that those who sponsor this legislation have basically attempted to take the existing language from the regulations and to draft legislation that would be as close to those regulations as possible to carry forward what was Mr. Bell's understanding of this legislation, as it dealt with education prior to *Grove City*.

Obviously it has to be altered and varied in some degree in order that we don't come back with another Supreme Court decision like *Grove City*. So there is some adjustment, some change, but that change is minimal.

Now, why is it that all of those who have had responsibility for administering these statutes during the period of the last 20 years—we'll hear from some of them in a later panel—reach this entirely different conclusion from what Brad Reynolds reaches with regard to these statutes. And why does Mr. Bell reach an entirely different conclusion in the area of education from that which Mr. Reynolds reaches at the Justice Department?

Mr. REYNOLDS. Well, I would suspect, Senator, that the difference of opinion probably derives from the fact that Congress has failed to state precisely what it means in its legislation and it tries through legislative intent—by statements of or from different members of Congress while you're considering legislation—to clear up or to take care of some ambiguities that are in the statutory language.

Clearly, the Supreme Court felt when it looked at title IX that the language Congress had written at that time required program-specific interpretation. There are a number of Members of Congress who were here at the time that legislation was enacted who have said, since the Supreme Court decision, that their intent at the time they drafted that legislation was that it would be institutionwide.

I think that points up—and Secretary Bell had said that he also understood it—I think that points up the problem, and it's a problem that I am here today trying to point up, because I do think that it is terribly important in order to get the Supreme Court to interpret the legislation as Congress intends, that Congress makes the effort to remove as much ambiguity as it can remove.

I have suggested, indeed the Secretary has suggested, that with some modification of the definition of recipient—and I would suggest consideration being given to the formulation in the Revenue Sharing Act that treats with a rebuttable presumption and with a return to the pre-*Grove City* language in the "pinpoint" provision—that there is certainly an ability to take S. 2568, and, with some modification, to tailor it to what the sponsors intend it, and to what the administration says it agrees with, in terms of the intent of this legislation, and to do the job.

Senator KENNEDY. Do you support institutionwide coverage under these statutes?

Mr. REYNOLDS. I certainly do. I said that right after the Supreme Court decision and I said it in in my statement in the House and I said it in my statement here today.

Senator KENNEDY. Have you in your statement today better language that would achieve that goal than the language that's included in the legislation?

Mr. REYNOLDS. Well, we certainly are prepared to work with this subcommittee on language. I am not today offering a particular formulation, but I do think that constructively we would be more than happy to work with you and the chairman and Senator Dole and your staffs to come up with language that we believe would fully accomplish the purpose that you have indicated that you and everybody else desire and at the same time to remove some of these ambiguities that I think really could well disserve that purpose in the long run.

Senator **Kennedy**. The examples, of alleged ambiguities that you used over in the House with regard to the application of the bill to universities, with regard to its application in various Federal block grants for educational purposes, with regard to other grants—are a distortion of the statute, which I really seriously think is a disservice to what we're attempting to achieve and accomplish.

I'm disappointed that you didn't bring language to clarify issues which you are concerned about, given the amount of interest by members of both parties in this legislation.

I would just hope that you would make as an addendum to your statement specific recommendations if you do have language which is better here to achieve and accomplish what has been outlined by the principal sponsors of this legislation to be its purpose and its reason. And that that would be made a part of the record.

Senator **Hatch**. I would like to see you do that also.

But I presume implicit in that perhaps, Senator Kennedy, is that you don't agree with those who have been advocating this bill who say that they will tolerate no amendments. It seems to me we ought to be working to try to resolve these conflicts if we can.

We start marking this up next week in the Labor Committee. So I'm hopeful that there will be an interest in having this bill amended to correct whatever difficulties do exist.

Mr. **Reynolds**. We are certainly interested in that regard and are ready to sit down and work immediately on coming up with language that is acceptable to everybody in accomplishing the purpose.

Senator **Kennedy**. I'd welcome language from you that is better than the language which we have in here to achieve that purpose.

Senator **Hatch**. We'd be happy if you would do that.

Senator Dole.

Senator **Dole**. Thank you very much. I want to follow up on that. I don't believe that any legislation is ever so perfect that it can't be amended. I think we ought to make it very clear that our responsibility may go beyond what some have said about not accepting any amendments. We have a duty to clarify the legislation, if necessary, I think most of us understand what we want to do with the legislation. We want to work with your Department to try and make certain that the bill does maintain the status quo. That's simply what we intend to do.

And we have a number of sponsors. The bill will be dealt with in a committee that I'm not a member of, but Senator Hatch is the chairman and Senator Kennedy is the ranking member on that committee.

We're concerned about some of the areas, too. Whether you clarify through changing the legislative language or through report language or intent, is another issue. But as you've indicated, there sometimes is a difference, as the Court demonstrated in *Grove City*. What some members thought they were doing turned out not to be the case.

So I am certainly willing, as someone interested in this legislation, and as a cosponsor, to try to work out some of these areas of real concern—but not just dreamed-up problems. We could never satisfy every concern that someone might imagine. Otherwise the

Court would be out of business, and we wouldn't want that to happen.

So I'm certain we can't take care of every conceivable possible area, but I would hope we might spend some time on trying to work it out.

As I understand it, you're certainly willing to do that.

Mr. REYNOLDS. Absolutely.

Senator DOLE. Do you have any suggested language prepared, or do you have anybody working on suggested language?

Mr. REYNOLDS. I think that there are several ways that a modification could be accomplished, and it would be useful, from our view, to be able to sit down with some of the sponsors and members of the committee and work out language in that fashion so that we're sure that we're fully sensitive to all the concerns that have been raised.

Senator HATCH. Bob, if you would yield. I would like to know what our goal is. Is our goal simply to overrule *Grove City?* If that's so, I think we can do that post haste. I think we can pass it through the Congress. I think we can resolve that problem. I think everybody would feel better about it. I think it would have tremendous bipartisan support. I didn't find that you differed at all with Secretary Bell on that particular issue.

Mr. REYNOLDS. We don't differ with Secretary Bell and there's no difference anywhere in the administration on that. We are fully in accord with what the sponsors have stated as their intent with regard to this kind of legislation. And we are willing to support legislation that is tailored to accomplish, and fully accomplish, that intent.

Our concern is that the legislation that we're now reviewing does have sufficient ambiguities and problems with it, as I've tried to explain, that it would be susceptible to a much different interpretation and a much different kind of an enforcement requirement than what the sponsors have indicated they're interested in.

Senator DOLE. But I would suggest that we don't really know how to handle these concerns until we sit down and talk about it, discuss it in detail. We have a number of knowledgable staff members, and certainly you have a number of knowledgable people. I think the best place to start would be to have a meeting, to see where we need to go. The legislative calendar is pretty well jammed up for the balance of the year. And if we can't find some agreement, we're going to be in deep difficulty.

Senator Baker indicated again today that unless you can get a time agreement on the legislation, you know, forget it. He didn't quite use those words.

Senator HATCH. They were stronger than that.

If you would yield one more time, my point is this: The original sponsors of this legislation indicated that all they wanted to do was simply overrule the *Grove City* case. If that's what we're trying to do, I'll be at the forefront of leading that charge to do it. But if what we're trying to do is to create trickle-down, trickle-up, trickle-around and everything else and inject the Federal Government into the lives of every State and local government, every private or public business, then I think it is going to be a hard——

Senator DOLE. Well, that's obviously not——

Senator **Hatch**. But that's what he's saying this bill does.

Senator **Kennedy**. Would Senator Dole just yield—because I think we're on his time. Is your response to his question applied to all the statute?

Mr. **Reynolds**. I was going to say that an effort to overrule *Grove City*, as I understand it, also contemplates making sure that 504 and title VI and the Age Discrimination Act have an institution wide coverage. Our view is that that can be accomplished. We would be happy to work with you on the bill that you proposed, and, with some modifications of language in that bill, our view is that we can fully achieve that purpose to your satisfaction. We can remove the kind of ambiguities that were of a concern to me. As I suggested in my testimony, the ambiguities are perhaps as susceptible to overly expansive interpretation, but are certainly something that will prove unnecessary, I think, with some work on the language.

Senator **Hatch**. I think that's a worthwhile goal. Why don't we do it.

Senator **Dole**. That seems like a logical process. I think that's the way we should proceed. As a Republican I don't want it to appear that we're coming kicking and screaming into the process and being opposed to every little change because somebody may have a different view.

As I understand your approach it is a positive one; you want to clarify certain areas and you support the legislation.

Mr. **Reynolds**. That's exactly what our approach is.

Senator **Dole**. And I think that's what our approach should be. But we want to pass it.

Mr. **Reynolds**. I agree with that, too. We are not trying to suggest in any way, shape, or form, that this legislation shouldn't be passed. We think it should be passed, and we're willing to support it, but, as I say, with the clarifications we think are necessary so as not to pass something that is markedly different from what the sponsors are suggesting that they intend to pass.

Senator **Dole**. All the sponsors are reasonable men and women—I haven't checked over the list carefully. [Laughter.]

But I think that's an assumption we use around here. So, we'd be very happy to participate in any way that we can. The important thing is to get it done, get it done this year, and do it. If we have to make certain minor amendments, we ought to make the amendments. If it takes report language or colloquy or whatever, it ought to be done. But it ought to be done in a way that is going to make certain that we haven't overly expanded what we thought we were doing, and that's the one concern you have, as I understand.

Mr. **Reynolds**. That's the concern.

Senator **Dole**. So we don't have trickle-up or trickle-down. I think we're all in agreement. I think the three of us could write this bill this afternoon if we didn't have the other panels.

I would ask that my statement be made a part of the record.

Senator **Hatch**. Without objection so ordered.

[The statement of Senator Dole follows:]

PREPARED STATEMENT OF SENATOR ROBERT DOLE

MR. CHAIRMAN. TODAY, THE SUBCOMMITTEE IS HOLDING A SECOND DAY OF OVERSIGHT HEARINGS ON THE RECENT GROVE CITY CASE. MOST OF THE TESTIMONY RECEIVED SO FAR HAS FOCUSED ON S. 2568, CURRENTLY PENDING IN THE LABOR COMMITTEE, WHICH IS DESIGNED TO OVERTURN THAT PART OF THE GROVE CITY DECISION WHICH NARROWLY CONSTRUED THE "PROGRAM OR ACTIVITY" LANGUAGE CONTAINED IN TITLE IX. AS A CONSEQUENCE, I WOULD LIKE TO FOCUS MY REMARKS ON CERTAIN STATEMENTS THAT HAVE BEEN MADE ABOUT THAT BILL DURING THE COURSE OF THESE HEARINGS.

FIRST, CRITICS OF THIS LEGISLATION HAVE EXPRESSED THE GENERAL CONCERN THAT IT WOULD RESULT IN COVERAGE MUCH BROADER THAN THAT INTENDED BY ITS SPONSORS, AND HAVE PRESENTED A NUMBER OF POSSIBLE SCENARIOS TO ILLUSTRATE THEIR POINT. I BELIEVE THESE COMMENTS ARE HELPFUL AND THAT IT IS IMPORTANT FOR THE BILL TO UNDERGO SCRUTINY. INDEED, IF CONGRESS HAD BEEN A LITTLE MORE CAREFUL WHEN IT PASSED THE MODEL FOR ALL THESE LAWS -- TITLE VI -- WE MIGHT NOT BE HERE TODAY.

ON THE OTHER HAND, IN CONSIDERING THE ARGUMENTS OF CRITICS, I THINK IT IS IMPORTANT NOT TO LOSE SIGHT OF THE VERY REAL SCENARIOS WHICH WILL PLAY OUT -- INDEED, ARE ALREADY PLAYING OUT -- IF CONGRESS FAILS TO PROMPTLY RESPOND TO GROVE CITY. IT IS BEYOND DISPUTE THAT GROVE CITY SIGNIFICANTLY RESTRICTED THE BROAD CIVIL RIGHTS COVERAGE WHICH HAD MARKED PRIOR ENFORCEMENT PRACTICE. INDEED, IT HAS BEEN REPORTED THAT THE DEPARTMENT OF EDUCATION HAS ALREADY HAD TO CLOSE A NUMBER OF CIVIL RIGHTS INVESTIGATIONS, AND NARROW THE SCOPE OF OTHERS.

IT WOULD BE NICE TO THINK THAT ALL RECIPIENTS OF FEDERAL FUNDS WILL TRY TO VOLUNTARILY COMPLY WITH THESE LAWS ON AN INSTITUTION-WIDE BASIS, EVEN THOUGH THIS IS NO LONGER LEGALLY REQUIRED. BUT THE FACT IS, WHEN VIEWED IN PERSPECTIVE, EACH OF THESE LAWS HAVE BEEN ON THE BOOKS A RELATIVELY SHORT PERIOD OF TIME: ALL WERE DESIGNED TO END A LONG HISTORY OF DISCRIMINATORY PRACTICES, MANY OF WHICH WERE WELL ENTRENCHED IN OUR SOCIAL FRAMEWORK. SOME DAY, I HOPE, BROAD FEDERAL CIVIL RIGHTS REQUIREMENTS WILL NO LONGER BE NECESSARY. BUT CLEARLY, THAT TIME HAS NOT YET COME.

SECOND, I WOULD OBSERVE THAT MUCH OF THE DISAGREEMENT SURROUNDING S. 2568 HAS FOCUSED ON DIFFERENCES IN INTERPRETATION OVER HOW THE BILL WILL OPERATE, AS OPPOSED TO REAL SUBSTANTIVE DISAGREEMENT OVER WHAT THE SCOPE OF CIVIL RIGHTS COVERAGE SHOULD BE. AGAIN, I BELIEVE THAT IT IS IMPORTANT FOR CONGRESS TO CAREFULLY EXAMINE THESE DIFFERENCES IN INTERPRETATION TO ENSURE THAT NO UNINTENDED RAMIFICATIONS WILL RESULT FROM THE BILL'S ENACTMENT. ON THE OTHER HAND, I BELIEVE THAT THE BILL CAN BE FULLY UNDERSTOOD AND FAIRLY JUDGED ONLY IF IT IS EXAMINED IN THE CONTEXT OF ITS LEGISLATIVE HISTORY AND THE EXPRESSED INTENT OF ITS SUPPORTERS. TO THIS END, I FILED WITH THE LABOR COMMITTEE A STATEMENT EXPRESSING MY OWN THOUGHTS AND PERSPECTIVES ABOUT HOW THIS BILL IS INTENDED TO OPERATE, AND I WOULD REQUEST THAT THAT SAME STATEMENT BE MADE A PART OF THIS HEARING RECORD.

FINALLY, I'D LIKE TO BRIEFLY COMMENT ABOUT STATEMENTS WHICH HAVE BEEN ATTRIBUTED TO SOME OUTSIDE GROUPS SUPPORTING THIS LEGISLATION TO THE EFFECT THAT THEY WILL BLINDLY OPPOSE ALL AMENDMENTS.

I SYMPATHIZE WITH THE NEED TO AVOID EXTRANEOUS AMENDMENTS TO S. 2568. BY PROPOSING THIS LEGISLATION, THE SPONSORS HAVE RISKED OPENING UP FOUR MAJOR CIVIL RIGHTS STATUTES, ALL OF WHICH WERE PASSED WITH SOME DEGREE OF CONTROVERSY AND GENERALLY, ONLY AFTER DELICATELY CRAFTED COMPROMISES WERE REACHED. SOME STILL BELIEVE THESE STATUTES DO NOT GO FAR ENOUGH. OTHERS STILL BELIEVE THEY GO TOO FAR. IF WE BEGIN DEBATING AND REHASHING ARGUMENTS UNRELATED TO THE JURISDICTIONAL PROBLEM RAISED BY GROVE CITY, SOME OF WHICH DATE BACK TO 1964, IT MAY WELL BE ANOTHER 20 YEARS BEFORE THIS LEGISLATION IS PASSED.

I ALSO BELIEVE, HOWEVER, THAT IT IS COUNTERPRODUCTIVE IF THE RESPONSE TO CONCERNS ABOUT HOW THIS LEGISLATION MAY OPERATE IS THE SIMPLE STATEMENT THAT NO AMENDMENTS WILL BE CONSIDERED OR ALLOWED. AS IS APPARENT FROM THE STATEMENTS THAT WERE MADE WHEN S. 2568 WAS INTRODUCED, THE INTENT OF THE COSPONSORS OF THIS BILL IS QUITE SIMPLY TO MAINTAIN THE STATUS QUO ANTE GROVE CITY. IF QUESTIONS ARE RAISED ABOUT WHETHER THE BILL WILL, IN FACT, ACHIEVE THAT PURPOSE, THEN THEY NEED TO BE WEIGHED AND ANALYZED BY CONGRESS ON THE MERITS. THAT IS THE LEGISLATIVE PROCESS. TO SUGGEST OTHERWISE WOULD BE TO DEMEAN THE PROCESS AND ENGENDER RESENTMENT, THUS THREATENING THE CONSENSUS NEEDED TO SECURE THIS LEGISLATION'S ENACTMENT. THANK YOU, MR. CHAIRMAN.

Senator DOLE. And with Senator Hatch leading the way, I am certain we can hammer this out in the next few days.

Senator HATCH. I would like to do that if we can. But we've been told no amendments, no way of resolving these problems. I don't care who the attorney is, he has to see these ambiguities and problems. I don't care who they are, not matter how partisan, no matter how one sided. They have to see these things. And whether they agree with your interpretation or not is always subject to——

Senator DOLE. I think the no amendment thing is we don't want to delay it forever.

Senator HATCH. I understand that, but if it stays in this form, I suspect it will be delayed forever. That's the problem. I personally think that the change ought to be made. Since this is our only crack at you, Mr. Reynolds, before we mark this up next week I am going to ask a few more questions.

The definition of recipient contained in S. 2568 differs from the definition currently in existence in the title VI regulations in a number of ways apart from its application on an institutionwide basis.

Let me ask you about several of these types of differences. What do you suppose was the reason for the exclusion of the term "individual" from the definition of "recipient," if you know? Why do you think that was done?

Mr. REYNOLDS. Well, my understanding was that the intent was to ensure that a person who received a Federal loan would not be covered, that they did not intend, for example, to reach the bearer of a medicaid card or food stamps.

The problem, as I indicated, is that someone who receives Federal assistance through such a person, even though that person is not covered, would, under this definition, be susceptible to coverage. That would reach the grocery store that is participating in a Food Stamp Program.

Senator HATCH. What do you suppose was the reason for the exclusion of the phrase ultimate beneficiary from the definition of recipient?

Mr. REYNOLDS. Again, as I understand it, I think that the feeling was that if you remove person that that took care of ultimate beneficiary and therefore it would be surplus. But there again, the problem is that there are ultimate beneficiaries that are not persons and there is the parenthetical reference to person, and I think when you put those two considerations together, removal of ultimate beneficiary is a protection that probably should be in the statute.

But again, I think it has got to be carefully done.

Senator HATCH. Apart from the policy issues involved here, do you have any serious concern with the constitutional issues here? For example, are there any clear constitutional limits upon the ability of the Federal Government to impose conditions upon States and localities as a function of its spending authority? Is this solely a policy question? Or are there issues of constitutional magnitude here?

Mr. REYNOLDS. Well, there could be. I think the principal concern in that regard is that the Supreme Court has indicated that when you are going to attach conditions that have to be met by the recipient of Federal funds you have to be clear and precise so that the recipient understands the bargain it is entering into. Where you have a statute that is vague and imprecise, and carries or is susceptible to an interpretation that it carries with it potentially a lot more conditions than appear on its face, you get into constitutional questions, under a recent decision of the Supreme Court, as to whether you can hold the State to the obligations or conditions that are read into the ambiguous language.

Senator HATCH. Prof. Charles Fried of the Harvard Law School testified here last week and he indicated that his principal concern with S. 2568 was not that we were sharply expanding the four civil rights statutes per se, but rather that we were expanding the so-called effects test in the context of several of these statutes, including title VI.

What would be your own thinking with regard to the observations of Professor Fried?

Mr. REYNOLDS. I think that, again, this relates to a recent Supreme Court decision that said that if you have a statute, like title VI, that is an intent statute, and the regulatory agencies have promulgated effect regulations, that it is possible to read the effects standard into the statute in some instances.

I think probably his reference was to the fact that one could interpret title VI, title IX, and 504 as effects statutes, and if you had the expansive coverage that I was suggesting might come from 2568 with an effects statute, then you really get into a whole host of questions of whether underrepresentation in a nonfunded entity is enough to violate the law—or if underutilization is enough to violate the law.

Senator HATCH. Then this is not simply just an expansion of traditional notions of civil rights, but an expansion of some rather novel theories of civil rights at this point.

Mr. REYNOLDS. I think that would expand the legal theory, yes.

Senator HATCH. But not necessarily traditional notions.

Mr. REYNOLDS. Well, no. The Supreme Court, in that decision, in *Guardians,* had about four different decisions, and they are still at different points in their own minds as to exactly the application of the effects regulations where an intent standard is in the statute.

Senator HATCH. Relatively little focus, as far as I can see has been given to the implications of S. 2568 from the perspective of either the Age Discrimination Act or section 504 of the Rehabilitation Act. While I realize that no one on this committee or anywhere else wants to appear insensitive to the protected groups in those areas, I wonder if perhaps we're ignoring some fairly important changes in public policy that might be required by this particular draft of legislation.

Do you have any thoughts on the implications of the pending bill in these particular areas? I'm talking specifically of the Age Discrimination Act and section 504 of the Rehabilitation Act.

Mr. REYNOLDS. The bill, I believe, would be susceptible to the expansive interpretation under all of the statutes that I outlined, and therefore would, in the age discrimination and the 504 handicapped discrimination, have an equally broad, potentially broad, reading.

One of the things that I think has not been fully considered and is worth considering is that the age discrimination statute has a number of exemptions in it, and that the Age Discrimination Employment Act is a different statute. As nearly as I can determine, there hasn't been a lot of attention paid to what impact this particular amendment would have on those kinds of complexities. In addition to that, as I mentioned, you have 26 other Federal statutes that have adopted or incorporated by reference title IX and title VI and 504 and, some of them, the age discrimination statute.

Those are all program-specific statutes, and it's not clear that this legislation would change that or alter that. It certainly would raise under some block grant programs a series of ambiguities as to which of the statutes controlled since this one is targeted only to the three statutes. Those are the kinds of complexities that I think can be sorted out and deserve some attention, because they will create some real problems.

Senator HATCH. Can you explain to us here what is meant by the concept of applying title IX and title VI and the other statutes not only to the recipients of Federal assistance, which you have stated is extremely broadly defined, but also to the transferees of such recipients? What does the concept of transferees add to the scope of coverage? Just how far does 2568 pursue the Federal dollar in its journey through the economy?

Mr. REYNOLDS. One of the concerns that we have, is that transferees is not defined—it's not talked of in terms of immediate transferees, and I suspect that an argument could be made that if you can trace the funds through a number of transferees you could indeed say that the coverage reaches that far.

If, for example, the Federal grant to a highway department is used to fund a subcontractor's activities and that subcontractor uses that to fund another subcontractor's activities, then you're going to be tracing those funds, under this bill, potentially down to the second subcontractor on the project.

If that's what Congress has in mind, then I think that it should be made a lot clearer than what we have in the bill.

Senator HATCH. Are there any implications of this legislation for the pending "Baby Doe" controversy involving the application of section 504 to hospitals receiving Federal medicare and other assistance?

Does the *Baby Doe* case relate at all to the scope of section 504, or only to the definition of what constitutes discrimination under that act?

Mr. REYNOLDS. I think that the Second Circuit ruling on *Baby Doe* has held that Congress did not intend, under section 504, to cover infants born with disabilities as a matter of handicap discrimination; that that was not what Congress had in mind in passing 504.

My own view is that this amendment does not suggest any change in that congressional intent, and therefore, if that decision stands, that this bill would not alter that coverage with regard to the Baby Does of this world.

Senator HATCH. Thank you. Senator Kennedy?

Senator KENNEDY. Mr. Chairman, the hour is moving along, and we have some other panelists. I would hope that we would hear from Mr. Reynolds at the earliest possible time from the Justice

Department on these concerns, with various language changes, so that we can move expeditiously.

I think Senator Dole has pointed out that time is running out in this session. If there are going to be recommendations and suggestions which Mr. Reynolds has indicated there would be, then I would hope that that would be done in a very expeditious way so that we would be able to consider those suggestions, and the members of the Human Resources Committee would be able to consider them prior to the time next Wednesday when the markup is set.

I would say that whatever steps would be taken to assure that would be very, very helpful and useful.

Senator HATCH. If we could urge you to do that, Mr. Reynolds, I think that would be very helpful. We are marking up next Wednesday, and whether we finish that day or not, I don't know, but we hope to. Put it that way.

If we could have your assistance at that time, it may be the way of resolving this problem and having a complete bipartisan support for this through the whole Congress. And I personally would like to see that happen.

I want to thank you for coming, and I appreciate your testimony, and I appreciate the unity that you and Secretary Bell have had on this issue, and the rest of the administration as well. So thank you for being here.

Mr. REYNOLDS. Thank you very much, Mr. Chairman.

[The prepared statement of William Bradford Reynolds and the addendum referred to follow:]

PREPARED STATEMENT OF WM. BRADFORD REYNOLDS

Mr. Chairman and Members of the Subcommittee, I welcome this opportunity to appear before you today to present the views of the Department of Justice on S.2568, the "Civil Rights Act of 1984."

Introductory Remarks

Let me preface my remarks on the proposed legislation by stating first my personal intolerance -- and the abiding intolerance of the President, the Vice-President, the Attorney General and every other member of this Administration -- of discriminatory conduct, in whatever form and however manifested, against any person on account of race, color, sex, national origin, handicap, religion or age. The nondiscrimination principle -- embodied in the ideal of a Nation blind to color and gender differences -- is at the center of America's historic struggle for civil rights. In that tradition, ours has been a profound and unwavering commitment to insure every citizen an equal opportunity to compete fairly for the benefits our Nation has to offer -- no matter how he or she might be grouped by reason of personal characteristics having no bearing on individual talent or worth. And, whenever that legal and moral command has been compromised by discrimination -- whether for reasons regarded as benign or pernicious -- the Administration has been quick to bring the full force of the law against the discriminator.

There is another principle that this Administration has been every bit as vigilant in protecting, the principle of Federalism that is at the foundation of our Nation's dedication to the ideals of self-government and individual freedom. We have, therefore, resisted unnecessary and overly intrusive expansion of federal power, particularly when the federal intrusion unduly impedes state and local governments' efforts to deal effectively with regional and local problems that most directly affect citizenry at the state and local levels.

As Senator Hatch noted in his statement regarding S.2568, the bill being considered by the Committee, as currently drafted, poses a tension -- in my view, an unnecessary tension -- between these two important principles of equal opportunity and limited federal involvement in state and local affairs. That, in itself, is not remarkable, since it has always been the case that Federal laws directed at protecting the civil rights of all Americans necessarily intrude on the domain of State and local law enforcement. The Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, the Education Amendments of 1972, the Rehabilitation Act of 1973, to mention but a few, along with the various amendments to each of these statutes, bring into focus the tension I have mentioned.

Heretofore, however, Congress has undertaken -- through thorough and extensive deliberations, comprehensive hearings, open and rigorous floor debate, and the amendment process -- to insure that the Federal role in the civil rights arena is as comprehensive as necessary to satisfy the need (based on congressional findings) for strong Federal protections against discrimination (i.e., the Voting Rights Act of 1965), but not so overly intrusive as to usurp unnecessarily legitimate State and local prerogatives (i.e., the Revenue Sharing Act of 1972).

We join with Senator Hatch and others in urging Congress to put "The Civil Rights Act of 1984" (S.2568) through the same close scrutiny, and subject it to the same rigors of an open and freewheeling debate (in Committees and on the floor of the House and Senate) that has been the strength of past enactments of civil rights legislation. Let me explain why, in the Department of Justice's view, it is critically important that this process not be short-circuited.

The Grove City Decision

S.2568 has been offered as a modest amendment of existing statutes, intended not to break new ground, but only to overturn the Supreme Court's recent decision in Grove City College v. Bell, 104 S.Ct. 1211 (1984), to the limited extent that the Court held Title IX of the Education Amendments of 1972 to be program-specific in its coverage.

Title IX, as you know, bars discrimination on account of sex, in any education "program or activity" receiving Federal financial assistance. The Supreme Court in Grove City ruled that a college which enrolled students receiving Basic Educational Opportunity Grants ("Pell Grants") was subject to Title IX coverage, but that the prohibition against sex discrimination applied, not to the college as a whole, but only to the federally funded program at the college -- in this instance, the student aid program.

Much has been said since Grove City about the Court's so-called "new interpretation" of Title IX, and considerable impetus for the current congressional interest in amending that statute comes from an assumption that the Court's pronouncement of Title IX as program-specific legislation altered the state of the law.

Simply to set the record straight, I would point out that the Court's "programmatic" reading of Title IX represents no change in the law. While some Federal agencies had previously pursued a more expansive reading of the statute -- one contemplating institution-wide coverage of Title IX -- the fact is that, before Grove City, every court of appeals except the Third Circuit in the Grove City case itself had construed Title IX to be program-specific in coverage. 1/ Indeed, as to the parallel Federal funding statutes dealing with race discrimination (Title VI of the Civil Rights Act of 1964) 2/ and with handicap discrimination (Section 504 of the Rehabilitation Act of 1973), 3/

1/ E.g., Hillsdale College v. Department of Health, Education and Welfare, 696 F.2d 418 (6th Cir. 1982), vacated and remanded, 52 U.S.L.W. 3700 (U.S. March 26, 1984) in light of Grove City College v. Bell, 104 S. Ct. 1211 (1984); Rice v. President & Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981), cert. denied, 456 U.S. 928 (1982); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982); Othen v. Ann Arbor School Board, 507 F. Supp. 1376 (E.D. Mich. 1982), aff'd 699 F.2d 309 (6th Cir. 1983).

2/ E.g., Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969).

3/ E.g., Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980). See also Consolidated Rail Corp. v. Darrone, 52 U.S.L.W. 4301 (U.S. Feb. 28, 1984).

they, too, had consistently been interpreted by the Federal appellate courts as program-specific. Thus, testimony provided to this Committee regarding, for example, the dramatic strides made by women in college athletics since Title IX was enacted in 1972 should properly be evaluated with the clear understanding that those strides were made under a program-specific statute, understood as such and consistently so interpreted by the Federal courts.

The Supreme Court in Grove City simply directed the Third Circuit court of appeals -- which alone among federal appellate courts had construed Title IX to have institution-wide coverage -- to get in line with existing judicial authority in this area, including earlier Supreme Court precedent. 4/

Nonetheless, we agree with many Members of Congress that there are sound policy reasons for Congress to consider an amendment to Title IX that will change its programmatic coverage to institution-wide coverage. In fact, I was accurately reported as stating as much immediately following the Court's announcement of the Grove City decision. Nor would it be inappropriate, in my view -- if Congress should find the need for it in these or other hearings -- to broaden in similar fashion coverage of the parallel antidiscrimination funding statutes that deal with race, handicap and age. That is, as I understand it, precisely what Congress has in mind. Based on that assumption, let me make it unmistakably clear: the Administration's concern with S.2568 lies not with the stated purpose of its sponsors, but only with the overly expansive language selected to reach the desired end. In the name of doing no more than "restoring" Title IX to institution-wide coverage, and providing a similar interpretation to three parallel statutes, the Senate has introduced a bill in S 2568 (like its counterpart in the House, H.R. 5490) that, by its terms, goes far beyond the limit set for it by its sponsors. Let me explain.

4/ North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

The Approach of S.2568

S.2568 would amend not only Title IX, but also three other civil rights statutes prohibiting discrimination in federally-funded programs: Title VI of the Civil Rights Act of 1964 (race discrimination); Section 504 of the Rehabilitation Act of 1973 (handicap discrimination); and the Age Discrimination Act of 1975 (age discrimination). We are told that the bill's aim is only to remove the programmatic limitation on coverage found in the current statutory phrase "program or activity" so as to make clear that coverage has an institution-wide application. The difficulty is that the vehicle used to accomplish this purpose is an overly expansive definition of "recipient" that takes civil rights enforcement not only well beyond the institutional horizons some have set for Title IX and the other statutes, but indeed into entirely new areas of responsibility, and without any guidance.

1. Definition of "Recipient." By deleting the phrase "program or activity" from the existing statutes and substituting in its place the word "recipient," S.2568 prohibits discrimination under the four statutes "by any recipient of" Federal financial assistance, rather than barring only discrimination within a recipient's federally funded programs or activities.

The bill includes a definition of "recipient" that is said to be "drawn from" existing federal regulatory definitions of that term under Title VI, Title IX and Section 504. There are, however, notable differences. A "recipient," as used in the existing regulatory scheme, is subject to coverage only as to its funded "programs or activities;" by contrast, under S.2568, a "recipient" is to be covered in its entirety. Beyond that, the bill's definition of "recipient" does not track any of the present regulatory definitions, but makes additions and deletions that expand the scope of coverage. Thus there is added at the end the new clause: "or which receives support from the extension of federal financial assistance to any of its subunits;" while the regulatory exemption for "ultimate beneficiaries" has been deleted. As presently proposed, the bill's definition, in its entirety reads:

> the term 'recipient' means --
>
> (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.

There is, admittedly, ample room for debate as to the exact breadth of this language. No definition of "receives support" is included in the bill and, thus far, statements by the sponsors and by witnesses at these hearings have left unclear the true legislative intent.

At a minimum, it seems that the term "recipient" is at least broad enough to insure coverage of an educational institution where federal funds are provided to one or more of its programs or activities, and thus the Supreme Court's programmatic interpretation of Title IX in Grove City would be overturned. It appears, moreover, that the definition of recipient would also reach all campuses of a multi-campus university (i.e., University of California) if any federal funds went to just one campus, or to students (through a Pell Grant) enrolled at only one college campus. Also, federal funds going to an undergraduate program would, under S.2568, seemingly include all graduate programs within Title IX coverage, even though there was no federal financial assistance at the graduate level.

To suggest a narrower reading of the language on the ground suggested by David Tatel (Tatel Test. at p.7) -- i.e., that the bill is designed only to "restore" Title IX coverage to pre-Grove City interpretations and those interpretations never went so far -- is to ignore that S.2568 is a different statute using different language under different circumstances. Small comfort can therefore be derived from past agency interpretations of a markedly different piece of legislation. The scope of the present bill will unquestionably be determined by its language and legislative history, not pre-Grove City activities. And that is why it behooves Congress to insist that the language of the bill accurately reflects the bill's purpose. Otherwise the Supreme Court will once again -- as it did in Grove City -- be forced to tell Congress that the law it passed fails to do what Congress intended for it.

What, for example, is the intended scope of coverage under S.2568 with respect to a college or university's commercial property? Rental property occupied by students or faculty would seem to be covered. But, also within reach of the broad recipient definition could well be university housing space rented to persons who are neither faculty nor students, or, for that matter, other commercial activities not associated with education, so long as it can be maintained that the non-educational enterprise "receives support" from the college or university that is in some aspect extended Federal financial assistance. Such an interpretation not only brings into play Title IX, but also Title VI, the Age Discrimination Act, and Section 504. Thus, for example, the regulatory requirement to make facilities accessible to handicapped individuals would, under S.2568, apparently apply to the non-educational ventures of a university as well as to those associated with its educational activities.

Nor does that necessarily define the outer limits of coverage. As S.2568 is written, when Federal financial assistance is extended to a "subunit" (not defined) of a larger "entity" (not defined), the larger entity itself -- whether it be public or private -- can be viewed as the "recipient" if it is deemed to have "receive[d] support from" (not defined) the federal funds going to the subunit. While Senator Dole and others have testified that this language is intended only as a "limited exception," other witnesses seem to regard it sufficient to meet the "receives support" standard if the Federal financial assistance to a subunit "frees up" non-federal funds to be used elsewhere (Tatel Test., at p.15). Courts thus could conclude on such a theory that if a federal agency extends federal assistance to a State university system, all other State departments or agencies -- whether or not they are educational or perform an education service -- would be brought within the coverage of the four statutes since the State "receives support" from the Federal assistance to the university system. The clear contemplation appears to be that Federal agencies will be able to investigate claims of discrimination against a nonfunded component of State government if some other component is funded.

For example, if a county water department receives a grant from the Environmental Protection Agency (EPA) to study the county's sewer needs, S.2568 would appear to provide that all of the county's operations are subject to all four civil rights statutes since the federal financial assistance can be said to give "support" to the county. Should EPA receive a complaint alleging discrimination in part of the county's operations that received no separate federal funds -- e.g., the county's road maintenance -- under the bill, EPA would presumably have the responsibility to deal with the allegation of discrimination, even though that agency has no knowledge or expertise in this area (it would fall within the province of the Department of Transportation).

In addition, under the proposed definition of "recipient" if the large entity receives Federal financial assistance, all subunits are swept within the coverage provisions -- whether funded or not and whether or not they "receive support" from the funding.

Thus, a federal block grant to the State for educational purposes would likely bring all political subdivisions of the State under the civil rights oversight responsibilities of the Federal government. Since there is no state that can claim it operates entirely free from Federal financial assistance, the extent of Federal intrusiveness into State and local affairs under S.2568 seems to be virtually complete. And, the bill would apply in similar fashion and with equal force to private commercial ventures and enterprises.

Moreover, all successors and assignees or transferees of a "recipient" become, under S.2568, recipients in their own right; as does any entity to which federal funds are extended ". . . through another entity or a person" (emphasis added). Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate.

While Senator Dole and others have testified that this is not the intent, the bill's language simply fails to preclude so broad a reading. It may well be that individuals receiving federal funds escape coverage, but, as I have already indicated, the express protection against coverage afforded by the existing regulations to "ultimate beneficiaries" of federal aid (28 C.F.R. §§ 41.3(d), 42.102(f)) -- such as farms, for example, under certain Department of Agriculture grants -- was not carried over in the statutory definition of "recipient." Thus, the bill is in fact susceptible to the broadest possible interpretation.

2. Enforcement Provisions. In addition to expanding the substantive coverage of the nondiscrimination funding statutes, S.2568 also substantially alters -- albeit again without any degree of clarity or precision -- the standards and methods of enforcing these statutes.

The bill would retain the existing enforcement options for the four statutes: Federal agencies would enforce either by fund termination by the particular Federal funding agency or by referral to the Department of Justice for litigation ("any other means authorized by law"); private parties would continue to have a private right of action. The scope of these enforcement mechanisms is measurably expanded, however.

As to the fund termination provisions, S.2568 replaces the current "pinpoint" language -- which limits fund termination to the particular program that has been discriminatorily conducted -- with new language providing for termination of "the particular assistance which supports" the discrimination (emphasis added). The ambiguity introduced by the "supports" phrase opens the way for a possible interpretation of the four statutes that would permit fund termination of a worthwhile and needy program which has never been operated in a discriminatory manner because the federal funds going to it provide "support" for another nonfunded program involved in unlawful discrimination. The new termination provision also admits of the argument that any federal assistance which goes to the entity as a whole necessarily "supports" the discrimination of the component parts and is thus invariably vulnerable to fund cutoff.

This broad potential for eliminating federal assistance programs would severely undermine the original intent of the program-specific limitation in Title VI, which "was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." Board of Public Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969) (emphasis by the court). Nor does this broad interpretation appear to be consistent with the overall context of the "supports" phrase in the bill itself, the focus of which is ostensibly on limiting, rather than expanding, the scope of funding termination as a sanction for noncompliance. Nevertheless, the bill does not specify in what respect a federal grant to one entity could be deemed to "support" discrimination committed by related entities and consequently implicate the vicarious termination requirement.

It has been stated that such a broad construction of the bill's new language was never anticipated. If, however, Congress truly intends, as some profess, to retain the "pinpoint" approach, the current language of the four statutes unambiguously requires the more modest fund termination remedy and there would appear to be no good reason to alter this formulation.

The alternate enforcement capability through litigation, which is available both to the Government and to private litigants, is also expanded by S.2568. Unlike the existing statutes -- where the Federal government's authority to proceed in court (and a private litigant's jurisdiction in court) is no more extensive than its authority to proceed in fund termination proceedings (North Haven Board of Education v. Bell, supra, note 4) -- S.2568 disregards this limitation, providing broader judicial enforcement capabilities than are available administratively. If a federal agency seeks to enforce through fund termination, it can, at most, under S.2568, reach only those practices that are supported by federal funds. Yet, on referral of the same matter to the Department of Justice for litigation (or if a private litigant is in court by way of private right of action), the bill contemplates that all the activities of a recipient, its subunits, subdivisions, instrumentalities and transferees, are reachable by the court -- even when there is no conceivable link between the violation and the federally funded activity. Thus, the Department of Justice (and private litigants) can seek to enjoin activity that plainly would not be subject to fund cutoff by the funding agency. The proliferation of lawsuits that will undoubtedly come from passage of such legislation cannot be overstated, and should prompt some consideration by Congress whether so open-ended an invitation to private attorneys to add measurably to our already overcrowded Federal court dockets will ultimately enhance or impede civil rights enforcement, as so expanded by S.2568.

3. Administrative Concerns. Nor can one overlook the serious administrative complexities that S.2568 presents to the Federal agencies. Agency regulations and paperwork requirements imposed under the four existing civil rights statutes are currently onerous in many respects. S.2568, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all the programs, activities, and subunits of a recipient, will remove existing

boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations and impose regulatory requirements.

The result, particularly for universities and state and local governments that typically receive funding from many agencies, would likely be multiple compliance reviews as well as multiple reporting and other regulatory requirements. Complainants could file with several agencies, resulting in duplication of effort and inefficiency in the operation of federal civil rights enforcement. Further, because agencies would be statutorily responsible for the activities of its federally funded and unfunded components, agency expertise in the operation of programs and activities that they do fund would no longer promote the avoidance of inappropriate requirements.

There is no procedure contemplated by the bill for interagency referrals that might serve to alleviate the concern over inexpert or duplicative agency complaint investigations. Nor is it clear, even under some agency referral systems, how the fund termination provision would operate if the discriminatory activity existed in a nonfunded component, as investigated by a referral agency, and there developed a disagreement as to whether the federal funds "supported noncompliance." No attention appears to have been given to this set of complexities by the drafters of S.2568.

Nor has attention been paid to twenty-six Federal statutes that make specific reference to Title VI, Title IX, Section 504, or the Age Discrimination Act. Several of these statutes, including the Revenue Sharing Act and the block grants contained in the Omnibus Budget Reconciliation Act, have broad impact. The drafters of S.2568 have not indicated what effect passage of S.2568 will have on the implementation of these program-specific statutes.

Closing Remarks

The foregoing observations are intended only to highlight some of the existing difficulties with the bill as drafted.

If the aim of Congress is to reshape Federal civil rights enforcement so as to assign to the Federal government pervasive oversight responsibility in the public and private sectors with respect to discrimination on account of race, sex, age and handicap, such a legislative undertaking should be carefully considered, fully debated, and cautiously constructed. There is, at present, nowhere near the Federal involvement in State and local affairs that will be required under S.2568. Nor can it honestly be maintained that legislation designed to overturn Grove City by making Title IX coverage -- even if expanded to include race, age and handicap -- institution-wide warrants such intrusive Federal activity.

While Congress may well conclude that such legislation is in the Nation's best interest, it should do so fully cognizant (1) that the additional costs of Federal enforcement under a bill as comprehensive as S.2568 can be staggering; (2) that the current regulatory regime is inadequate to the task and will necessarily need to be revised and likely expanded; (3) that the paperwork requirements can only increase (and probably dramatically); (4) that with new legislation so dramatically different from the existing statutes invariably comes considerable litigation, leaving the law unsettled for some years; and (5) that whatever shape the Federal funding statutes might ultimately take, this body must, for constitutional purposes, define with precision what conditions it is imposing on the grant of federal funds to states so that, as "recipients," states "can knowingly decide whether or not to accept those funds" as so conditioned. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

The Department of Justice's review of the foreseeable effects of S.2568 convinces us that the sweeping scope of the language proposed in the bill provides a much broader application than simple reversal of the Grove City decision -- broader, indeed, than extending institution-wide coverage under Title IX to race, age and handicap discrimination as well. The perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies and courts. At worst they may include unwarranted interference with important state prerogatives and even lead to adverse judicial decisions as to their enforceability.

It is therefore important to tailor S. 2568 to its stated purpose and to carefully craft the proposed bill with full attention to the complexities of the undertaking. This can be achieved, in the Justice Department's view, with some modification of the proposed definition of "recipient" and a return of the "pinpoint" provision (*i.e.*, the fund cutoff provision) to its pre-*Grove City* status.

In addition, the Committee might want to consider using the approach to coverage for state and local governments that was adopted by Congress in the civil rights provisions of the Revenue Sharing Act. The federal funds under that statute go to municipalities without being earmarked for particular use. A presumption attaches that the federal financial assistance is provided to all municipal programs and activities unless the city can show, by clear and convincing evidence, that a particular department or service received no federal funds. If a similar rebuttable presumption existed under S.2568 for State and local funding, the bill's coverage, while still generally applicable to states and localities, would be far more manageable as an enforcement matter.

The Department of Justice stands ready to work with the Committee on these and other modifications of S.2568 so as to align the bill more closely with the stated objectives of its sponsors. It is critically important that legislation of this sort be drafted in precise, clear terms that leave no room for speculation as to its reach and application.

Thank you. I will be happy to answer any questions.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

July 31, 1984

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

By letter of July 17, 1984, you have inquired whether the concerns expressed in my testimony before the Senate Judiciary Subcommittee on the Constitution concerning the Civil Rights Act of 1984 (June 5, 1984) have been relieved in any way by further analysis of this legislation in light of the House Committee Report and the two-day floor debate preceding House passage of the bill. This letter is in response to your inquiry.

At the outset, let me reassert what I have stated publicly many times -- this Administration welcomes Congress' consideration of an amendment to Title IX to insure that the statute provides for institutionwide coverage. An amendment addressing the same coverage question for three parallel anti-discrimination statutes (Title VI, Section 504 and the ADEA) is similarly an appropriate matter for congressional consideration. Our concern is not with the sponsors' statement of purpose; it is, instead, with the means selected to reach the desired end.

S. 2568 has been offered as a modest amendment to existing statutes, intended to break no new ground but only to restore Title IX to its pre-Grove City coverage, and conform the coverage of three parallel statutes. In point of fact, S. 2568 goes well beyond the limits set by its sponsors, and, as even they acknowledge, is framed in expansive language that lends itself to an exceedingly broad interpretation. In my June 5 statement to your Subcommittee, I discussed a number of potential coverage problems likely to arise because of the bill's lack of precision and clarity in its principal provisions. The most frequent response was that my concerns -- while perhaps well founded -- could be satisfied by making clear in the legislative debates and Committee reports that the focus of the proposed amendments was intended to be narrower than the language indicates.

With that in mind, I have carefully reviewed the House Committee Hearings and Report and the floor debate on H.R. 5490 -- the companion bill to S. 2568. Rather than clarifying the bill's scope, the legislative deliberations on H.R. 5490 reinforce the view that the loose language currently under consideration means different things to different people and is, as a result, a most unsatisfactory vehicle for accomplishing the overriding purpose of the bill. What follows are the more obvious areas of ambiguity, inconsistency and, in some instances, even outright contradiction.

1. The sponsors insist that they desire to return Title IX coverage (and similarly coverage under Title VI, Section 504 and the ADA) to pre-*Grove City* status. Yet, the definition of "recipient" -- *offered to achieve* this result -- is in certain material respects *entirely new*. Even assuming *arguendo* that Title IX (and the *three parallel* statutes) *triggered institution-wide* coverage prior to *Grove City*, 1/ a "recipient" under existing regulations is one who *receives Federal* financial assistance directly "or through another recipient." 34 C.F.R. §106.2(h). The bill alters this last phrase (dealing with indirect coverage) by adding as recipients also those who receive Federal financial assistance "through another entity or person."

What does Congress intend this new terminology to mean? The House Committee Report advises that the new legislation is to be read "broadly." 2/ On the other hand, different members of the House stated that they understood the term "recipient" to be no broader than under existing law. 3/ This would require a reading of the new language, *i.e.*, "another entity or person," as confined only to those entities or persons who are themselves "recipients" -- not entities or persons who act as conduits and through whom Federal financial assistance merely passes.

2. Congress pretty clearly understands the "indirect" coverage language to have a somewhat broader application, since,

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1/ For discussion of pre-*Grove City* coverage see *Civil Rights Act of 1984*; Hearings on *S. 2568 before the Subcommittee on the Constitution* of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. ____ (1984) (statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division) June 5, 1984 at pp. 4 & 5.

2/ H.R. Rep. No. 98-829, 98th Cong., 2d Sess. 26 & 30 (1984).

3/ House citations are to 130 Cong. Rec. ____ (daily ed. June 25 or 26, 1984). H6799 (statement of Rep. Rodino); H6808, 6810 (statement of Rep. Bartlett); H6815 (statement of Rep. Sensenbrenner); H7033 (statement of Rep. Edwards); H6806 (statement of Rep. Coleman); H6802 (statement of Rep. Fish).

by general consensus, an educational institution receiving Federal financial assistance solely through students ("persons") who fund their education with BEOG grants is regarded as a "recipient" under the bill. 4/ Yet, members of the House were not nearly so certain about grocery stores receiving Federal financial assistance solely through individual customers ("persons") who participate in the Food Stamp program. While some Congressmen insisted food stamps would not trigger store coverage, 5/ the legislative debates produced as well exactly the opposite interpretation 6/ -- notwithstanding the inconsistency of the broader interpretation with pre-Grove City coverage. 7/ The Committee Report only adds to this uncertainty by discussing coverage of grocery stores in other funding contexts but sidestepping the issue in the context of food stamps. 8/ This obfuscation leaves unsettled as well

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4/ H.R. Rep. No. 98-829, *supra*, note 2, at 30-32.

5/ H6814 (statement of Rep. Sensenbrenner); H7039 (statement of Rep. Miller). In direct contradiction to Congressman Simon (see note 6): "... A food stamp or Social Security recipient could not bring under coverage, for instance, institutions to which those funds are transferred -- such as stores..."; H6802 (statement of Rep. Edwards). See also S4595 (statement of Sen. Cranston).

6/ H7038 (statement of Rep. Simon) (". . . a supermarket which accepts food stamps is covered . . .;") In response to inquiry from Rep. Bartlett regarding accessibility of small neighborhood grocery stores to the handicapped, Congressman Simon stated: " . . . these regulations include a broadly constructed concept of program accessibility which would permit home deliveries as well as other alternative means to assist shopping by a handicapped individual. . . ." *Ibid*.

7/ *Civil Rights Act of 1984*; Hearings on S. 2568 before the Senate Committee on Agriculture, Nutrition, and Forestry, 98th Cong., 2d Sess. ____ (1984) (statement of Daniel Oliver, General Counsel, Department of Agriculture), answer to question No. 10 submitted by Senator Jesse Helms to Daniel Oliver.

8/ H.R. Rep. No. 98-829, *supra*, note 2, at 31. The Committee Report directly addresses the question of coverage of recipients of SSI, food stamps, welfare and other general-purpose governmental programs. While expressly denying coverage of AFDC and SSI funds received by landlords or grocers, the report avoids any similar clarification regarding food stamps:

> During the hearings, concerns were raised about the analogy between coverage triggered by student federal financial assistance and recipients of S.S.I., food stamps, welfare or other general-purpose governmental programs. . . .

(Cont'd)

Congress' intent on other perplexing coverage issues involving receipt of Federal financial assistance "through another entity or person" -- for example, landlords "receiving" rent subsidy payments, farmers under farm subsidy programs, drug stores and other businesses selling items authorized for medicaid reimbursement to medicaid beneficiaries. The legislative history sheds no light on such matters.

3. Adding to the confusion is another change in the definition of "recipient" from its meaning prior to Grove City. The bill excludes "person" and removes the exemption for "ultimate beneficiaries." The House Report suggests that a coverage change was unintended by these alterations and indicates that an individual receiving a research grant should, notwithstanding the language change, continue to be included. 9/ If so, what about other "persons" receiving Federal financial assistance, such as farmers, or tenants on rent-subsidy programs, or patients reimbursed by medicaid and medicare, and the like. These individuals are, under existing law, excluded from coverage as "ultimate beneficiaries." With that exclusion removed, no clear bright line has been drawn by Congress to indicate which "persons" are to be viewed as "recipients" and which are not. The House Report indicates a person's receipt of an SSI check is probably not a basis for coverage, 10/ but there is otherwise no useful guidance. Certainly, farmers -- treated as "ultimate beneficiaries" under existing law, even pre-Grove City 11/ -- are far more vulnerable under S. 2568, especially if they incorporate or form cooperatives or associations.

4. S. 2568 appears to expand coverage of existing law in yet another way. By applying the statutes' anti-discrimination provisions to "recipients" (rather than programs) receiving Federal financial assistance, the bill, as drafted, would seemingly reach all subdivisions, subparts and subunits of a larger institution or entity, public or private, that received Federal funds (without any fund tracing). Congressional intent is difficult to discern from the House debates. The Committee Report insists on giving

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8/ (Cont'd)

> . . . Under the bill, as has always been true, neither the landlord whose rent is paid with the proceeds of an AFDC or SSI check, nor the grocer who is paid for food from an SSI check, is covered as a result of that transaction."

9/ H.R. Rep. No. 98-829, supra, note 2, at 27, 28, 30.

10/ Id. at 27.

11/ Civil Rights Act of 1984; supra, note 7, at 3-5 and answer to question No. 2 submitted by Senator Jesse Helms to Daniel Oliver.

the bill "broad" coverage, 12/ while a key sponsor of the legislation in the House resists a reading that permits coverage of all parts of the whole, no matter how unaffected some of them may be. 13/ Even more confusing, the House appears to interpret "recipient" differently depending on whether the context is public or private. In the private sector, no suggestion is made of an interpretation delimiting the broad reach of the proposed language. Thus, an extension of Federal financial assistance to the corporate home office brings within the statutes' proscription all subsidiaries, plants, divisions and subunits of the corporation, without regard to whether they actually received, or ever benefitted from, the Federal funding. 14/ Also, a college or university that is a recipient because some of its students receive BEOG grants, is covered not only under Title IX educational activities but also under Title VI, Section 504 and the ADA as to any and all other activities, including its commercial operations (if any). 15/ In the public sector, on the other hand, the same language is viewed by some to be less expansive. According to the House Report, Federal financial assistance to the State does not automatically permit the State's political subdivisions to be covered. In contrast, it would necessarily lead to coverage of all state agencies and departments. 16/ This treatment in the House Report suggest some degree of internal inconsistency. Furthermore, the members of the House expressed varied understandings of coverage as it applies to subdivisions and subunits. 17/ As a consequence, it remains unclear what the intended scope of coverage is.

12/ H.R. Rep. No. 98-829, *supra*, note 2, at 26 & 30.

13/ H7034 (statement of Rep. Schneider).

14/ H.R. Rep. No. 98-829, *supra*, note 2, at 28.

15/ *Id*. at 32. See also H7054 (statement of Rep. Ferraro).

16/ *Id*. at 26.

17/ *Compare* H6813 (statement of Rep. Edwards) ("Federal assistance will trigger coverage of its parent entity if the Federal funds benefit the parent entity; *once coverage is triggered the parent entity is covered throughout its operations*." (emphasis supplied)) *with* H7022 (statement of Rep. Fish) ("*Other agencies in the State government are not covered unless the grant funds are used to support the State Government* -- parent entity -- as a whole through assignment of some portion of the Federal grant fund to the Governor's office or for other central State services . . ." (emphasis supplied)), *and with*, H7034 (statement of Rep. Schneider) (". . . questions that have been raised dealing with when a State receives a block grant from the Federal Government, as to whether all departments and agencies of the State or other subunits within the State -- even those who do not receive any of these block grant funds -- are covered. The answer is very clearly no, based on previous legislative history.")

5. Nor do the House debates serve to clarify another feature of S. 2568. New language added to the definition of "recipient" provides that an entity as a whole can be covered if it "receives support from the extension of Federal financial assistance to any of its subunits." 18/ The phrase "receives support" has been variously described in Congress. One part of the House Report suggests that the "support" contemplated by this new language must be tied to financial assistance, such as "administrative overhead" of the parent entity that comes from the subunit's grant of Federal funds. 19/ At the same time, the Committee leaves open whether a tracing of funds is always required. The Report's directive that the term "support should be interpreted broadly" raises the possibility that less direct and less tangible support could trigger coverage of the larger unit by reason of having a subunit "recipient." Indeed, the Committee Report adroitly avoids equating "support" with "Federal financial assistance" (which is itself a very broad concept), electing instead to link the two terms only by vaguely analogizing one to the other. 20/ Members of the House only confused the issue as key sponsors of the House bill described this feature of the proposed legislation in both expansive 21/ and restrictive 22/ terms. There is, for example, a direct conflict over whether fund displacement (i.e., the fact that Federal financial assistance to a subunit "frees up" funds of the parent entity for other uses) amounts to "support" as

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18/ H.R. Rep. No. 98-829, supra, note 2, at 26.

19/ Id.

20/ "The current regulations defining 'federal financial assistance' which remain unchanged, are guidance for the meaning of 'support.'" H.R. Rep. No. 98-829, supra, note 2, at 30. In fact, agency regulations define "Federal financial assistance" as more than mere funds. E.g., 34 C.F.R. §106.2(g) Department of Education, Title IX regulation. They include equipment, services, facilities and the use of personnel. If the term "support" in the bill is to be analogized to (not equated with) this regulatory definition, it could even be argued that its meaning can be assigned a much broader reach. Again, the legislative history provides no help in discerning the true intent of the House in this regard.

21/ H6810 (Rep. Bartlett); H7034 (statement of Rep. Schneider); H6813 (statement of Rep. Simon); H7024 (statement of Rep. Fish); See also S4595 (statement of Sen. Cranston); S4598 (statement of Sen. Leahy).

22/ H7024 (statement of Rep. Edwards).

used in the bill. 23/ Moreover, little effort has been made to square any reading of the "support" clause with pre-Grove City coverage. Indeed, to the extent the phrase is interpreted to mean nothing more than that the Federally funded entity provides "significant assistance" to the operation of another separate and distinct entity 24/ it flies in the face of clear case law to the contrary -- case law that preceded Grove City. 25/

6. A further ambiguity in S. 2568 pertains to the addition of the term "support" in the termination provision. Federal financial assistance that "supports" discriminatory conduct can be terminated under the bill. The House debates left considerable doubt as to exactly why this new concept was introduced by amendment and what was really intended by the phrase. On the one hand,

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23/ Compare H7019 and H6813 (statement of Rep. Simon) (". . . a subunit receiving Federal assistance will trigger coverage of its parent entity if the Federal funds benefit the parent entity") with H7024 (statement of Rep. Edwards) (". . . coverage of the larger entity does not result from the fact that Federal financial assistance to the subunit 'frees up' funds to the parent entity . . . ."). See also Civil Rights Act of 1984: Hearings on S. 2568 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 98th Cong., 2d Sess. ____ (1984) (statement of David S. Tatel) May 30, 1984 at pp. 15 & 16. Tatel's understanding of the reach of the "support" clause was described in these terms: "Second, the Grove City decision totally ignores the fact that receipt of federal financial assistance for one "program or activity" may well free-up non-federal funds to be used in other programs or activities in the same institution. There is absolutely no reason why a person who is discriminated against in the latter program -- that is, the program which has more local funds because of the receipt of federal financial assistance elsewhere in the institution -- should receive any less protection than the person discriminated against in the program or activity directly receiving the federal financial assistance."

24/ H.R. Rep. No. 98-829, supra, note 2, at 31.

> A private university receives federal funds and provides a significant amount of assistance to a semi-autonomous institute. Is the institute covered under the anti-discrimination provisions?
>
> Yes. The institute is covered because of the "significant" assistance from a recipient.

25/ Iron Arrow Honor Soc'y v. Hufstedler, 499 F. Supp. 496 (S.D. Fla. 1980), aff'd sub nom. Iron Arrow Honor Soc'y v. Schweiker, 652 F.2d 445 (5th Cir. 1981), vacated, 102 S. Ct. 3475 (1982), aff'd on remand sub nom. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983), vacated per curiam as moot, 104 S. Ct. 373 (1983).

it is understood by some as making no change in existing law -- *i.e.*, maintaining the *status quo* prior to *Grove City*. 26/ On the other hand, it is seen by others as opening the door to fund termination on an institutionwide basis. 27/ The Committee Report provides little clarification, stating in one instance simply that fund cutoff will be allowed "only to the limit of the federal assistance," 28/ and advising elsewhere that what is intended is a continuation of the existing programmatic approach. 29/ If, as has been suggested, the termination provision is to operate in the same manner as always, the question has been raised as to why any "clarification" is needed. 30/ Fund termination was not

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26/ H6810 (statement of Rep. Bartlett); H6815 (statement of Rep. Sensenbrenner); H7021 (statement of Rep. Simon); H7022 (statement of Rep. Hayes).

27/ H6816-6817 (statement of Rep. Fauntroy); H7045 (statement of Rep. Pickle); H7052 (statement of Rep. Gilman); H7052 (statement of Rep. Richardson); H7053 (statement of Rep. Addabbo); H7055 (statement of Rep. Kaptur); H6816 (statement of Rep. Ackerman); H7056 (statement of Rep. Foglietta).

28/ H.R. Rep. No. 98-829, *supra*, note 2, at 39.

29/ *Id*. at 34.

30/ H7023-7024 (statement of Congressman Dannemeyer) Congressman Dannemeyer specifically asked: "If H.R. 5490 is not intended to change the scope of the termination power, why doesn't it retain the language currently in the statute"; H7023-7024 (statement of Rep. Fish) Congressman Fish's response to Dannemeyer's inquiry, suggesting that the scope is, indeed, expanded only adds to the state of confusion:

> *Taylor* notes that 'if the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper'. Thus, for example, if it could be established that federal funds distributed to *subunits* of a state mental health department in *some way* supported the discrimination found in a *subunit*, not directly receiving federal funds, then *those funds* would be subject to termination as well.

See also *Civil Rights Act of 1984*; *supra*, note 1, (statement of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division) June 5, 1984 at pp. 15-17; (statement of Charles Fried, Harvard Law School) May 30, 1984 at p. 8; (statement of Linda Chavez, Staff Director, United States Commission on Civil Rights) May 30, 1984 at pp. 11 & 12.

implicated in Grove City, and presumably need not be reformulated in the aftermath of that decision if, in fact, no different approach is contemplated.

As the foregoing discussion reflects, legislative history has thus far served to do little in the way of clarifying the ambiguities or explaining the broad generalities that mark the terminology of S. 2568. While the overall purpose of the bill remains relatively clear -- i.e., to return Title IX and the three parallel statutes (Title VI, Section 504 and the ADA) to the "institutionwide" coverage they allegedly enjoyed pre-Grove City, the means chosen to accomplish that task are imperfect at best. Confusion exists as to the meaning of key words and phrases, as to the scope of coverage and, indeed, as to the pre-Grove City "benchmark" that Congress says it is "returning to."

In view of these realities -- considered against the backdrop of Legislative history in the House that does not begin to resolve the many ambituities in the bill as presently worded -- language modifications to the S. 2568 itself appear imperative. To this end, I and others in the Administration have, as you know, been working with staff members of a number of Senators to develop amendments designed to clarify the bill's language consistent with the sponsors' stated purpose. I remain hopeful that these efforts, along with those of this Committee, can produce a legislative product that resolves existing concerns and is acceptable to all.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Senator HATCH. We will now go to a panel consisting of Ms. Althea Simmons of the NAACP, Dr. Arthur Flemming of the Citizens' Commission on Civil Rights, Judith Lichtman of the Woman's Legal Defense Fund, and Patrisha Wright of the Disability Rights Education and Defense Fund.

STATEMENT OF A PANEL CONSISTING OF ALTHEA T.L. SIMMONS, NAACP; ARTHUR FLEMMING, CITIZENS' COMMISSION ON CIVIL RIGHTS; JUDITH LICHTMAN, WOMEN'S LEGAL DEFENSE FUND; PATRISHA WRIGHT, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND; AND DAVID ELLIS, LAFAYETTE COLLEGE

Senator HATCH. We would like you to confine your comments to 5 minutes each. We are running out of time today and we need some time for questions.

Let's start with you, Ms. Simmons. We are happy to welcome all of you here and we hope that this time will be well-spent for all concerned. Ms. Simmons?

Ms. SIMMONS. Thank you, Mr. Chairman.

I am Althea T.L. Simmons, director of the Washington Bureau of the NAACP, and I appreciate this opportunity to appear before you to express our very strong support for S. 2568 that is before this committee.

Although my testimony will be limited to title VI of the 1964 Civil Rights Act, we have no doubt in the NAACP that an attack on title IX is also an attack on 504, the Age Discrimination Act, and title VI, which is the benchmark legislation on which the other acts are derivative.

Therefore, it is our considered opinion that the Congress must act forthrightly to reaffirm the judicial and executive branch's interpretation of the law and enforcement practices as they existed pre-*Grove City*.

We have heard a number of farfetched hypotheticals, ostensibly to clarify the scope of the four statutes, but it is our considered judgment that the objective is to raise the spectre of Orwellian fear and cause defeat of this much needed legislation.

Most of the hypotheticals raised during these hearings have been taken out of context of how Federal assistance is given.

For example, if you take the one with reference to whether or not a retail pharmacist would be subject to title VI regulations, because they process medicare and medicaid subsidized prescriptions, then the response would be "No."

The local pharmacist, although beloved, is not within the scope of the intent of Congress. But a hospital, for example, that receives massive Federal funds, which go to medical facilities, hospital construction, or grants for teaching and training would be covered.

It is quite interesting to note that some of the same questions, now being raised Mr. Chairman, were addressed 20 years ago when section 601 of the 1964 Civil Rights Act was debated in committee and on the floor.

These interesting intellectual questions appear in constitutional law textbooks as mind teasers, but they have little relationship to the way government in America works.

Title VI simply provides that no person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI is the only one of the incident statutes that has the constitutional command. And as you read back into the history, then Judiciary Committee Chairman Celler said, "The express purpose of title VI was to clarify and confirm the authority of the executive branch to preclude discrimination or segregation by recipients of Federal assistance."

The question that has often been raised was raised again here today, as to whether or not discrimination on a single campus or multicampus, high educational institution would subject the entire university system to fund termination, the answer we believe is "No."

As regard coverage, there is no trickle up unless there is a factual showing that the larger unit benefits from the financial assistance to the smaller unit.

Where termination is concerned, there must be a factual showing that: One, there is discrimination supported by Federal financial assistance or nexus and only after you have jurisdiction can you look to see if there is true unlawful discrimination.

In other words, there is no automatic umbrella coverage of the larger entity without a factual showing that the larger entity is receiving direct or indirect Federal financial assistance.

The question has also been raised as to whether or not the issue before the committee has to do with traditional notions of discrimination. The answer is a resounding "Yes."

Those of us who make up the discriminatees have no doubt at all that the use of Federal funds to unlawfully discriminate is traditional, past and present.

Discrimination is the issue. We believe that so long as one feeds at the public trough, under title VI and other statutes, you may not unlawfully discriminate on the basis of race, color, national origin, age, handicap or sex.

This is not Federal intrusion into the private sector or into State and local governments. To do otherwise, as regard title VI, would be to flaunt the 14th amendment to the Constitution, which is supposed to do away with discrimination with this guarantee of equal protection under the law, and subsidize racial discrimination.

I was a little bit amused when I heard the question with reference to whether a dollar of funds to the highway department—I just do not think the highway department can do anything with a dollar, Mr. Chairman. I think you have to talk about more money than that.

Senator DOLE. They can. My wife is good at that. [Laughter.]

Ms. SIMMONS. I forgot you were here, Senator. [Laughter.]

But under the interpretations of the law a recipient is covered in its entirety, including its subunits. Political subdivisions, for example, cities, are legal entities in and of themselves and should not be treated as subunits of the State.

A political subunit must, itself, receive assistance in order to be covered.

On the other hand, where a State receives Federal funds, all State agents and departments would be covered.

Mr. Chairman, we noted a question that dealt with whether or not nonprofit organizations such as the NAACP, Urban League, et cetera, would be subject to private actions if they received direct or indirect general assistance and failed to employ a proper number of racial and ethnic groups.

Well, I am pleased to say that we do not receive Federal funds. The second thing is that the question appears to me to smack of quotas, proportional representation and that issue is not before us at this time.

But I do believe that under title VI there is an express exclusion of employment from coverage in section 2000(d)(3) which says in pertinent part that nothing should be construed to authorize action by any department, agency with respect to any employment practice of any employer, employment agency or labor organizations except where primary objective of the Federal financial assistance is to provide employment.

Title VI covers employment, if the primary purpose of the Federal funds are for employment or in schools where the students are affected by discrimination in employment.

In order not to run out of time, Mr. Chairman, may I just close by saying that it is our feeling that something must be done in terms of trying to clarify *Grove City*, to restore the law to where it was, pre-*Grove City*.

It is our firm belief that one may think what one pleases, but in the final analysis, there should be no federally supported discriminatory conduct, public or private, based on race, color, or national origin, handicap, or sex.

And under our Constitution, individual States and local governments are free, but they shall not use State action to continue the incidents and badges of slavery. They shall not violate the 14th amendment.

We support the expeditious passage of S. 2568, to reiterate the laws and interpretations of our national commitment to the end of illegal discrimination.

S. 2568 clearly and simply says that if one chooses to receive Federal financial assistance, a condition precedent is enforceable upon us not to prohibit participation based on race, color, national origin, sex, age or disability.

And after 20 years of life under the Civil Rights Act, and over 100 years after the end of slavery, any other reading of S. 2568 must be a subterfuge for disbelief in the principle of equality.

Thank you so much, Mr. Chairman for allowing us to come testify.

Senator HATCH. Thank you, Ms. Simmons, for your testimony. We will place the full statements of all witnesses in the record.

Without objection, the statement of Ms. Althea Simmons will be inserted in the record at this point.

[The statement of Althea T.L. Simmons follows:]

PREPARED STATEMENT OF ALTHEA T. L. SIMMONS

Mr. Chairman and members of the Committee, I am Althea T. L. Simmons, Director of the Washington Bureau, National Association for the Advancement of Colored People, an organization of 1800 chapters, youth and college divisions, celebrating its 75th anniversary this year. We are here in support of the swift passage of S. 2568, the Civil Rights Act of 1984 which will clarify the scope of coverage of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.

We support S. 2568 because of the consequences attendant the United States Supreme Court decision in Grove City College v. Bell, the narrowed meaning of the scope of coverage, as articulated by the Court, impermissably attacks the Congressional intent to prohibit the use of federal financial assistance to support illegal discrimination.

HISTORY

As this Committee is well aware, Title VI of the Civil Rights Act is the benchmark legislation from which the other laws are modeled. We must be mindful, however, that Title VI is a constitutional command: a prohibition against racial discrimination, expressly forbidden by the Civil War Amendments and the 5th Amendment to our Constitution. The specific goal of Title VI is remedial legislation, broadly interpreted to "eliminate racial discrimination from the social fabric of the nation." Adams v. Richardson, 480 F. 2d 1159, 1016 (D.C. Cir. 1973). Title VI merely codified the law of the land.

The conditions surrounding passage of the Civil Rights Act of 1964 must be emphasized. Across the nation public taxpayer money was used to encourage and support racial segregation.

"Jim Crow", the symbol of segregation reigned in school rooms, railroad stations, hospitals and cemeteries too often supported by federal financial assistance.

Over 100 years before,civil rights laws had been passed to effectuate the national law as expressed in the 14th Amendment and restating the prohibition against the denial or infringement of the rights secured under the Constitution.

Yet, Mr. Chairman, three students were murdered, children were firebombed, men and women were arrested trying to exercise those guaranteed rights. In 1963, thousands marched on Washington to demonstrate the gulf between our laws and values and our behavior. The parallels of 20 years ago are striking - last year, thousands again came to Washington to illustrate the degree to which we have not incorporated our constitutional mandates into our conduct.

SCOPE OF TITLE VI

For over 20 years Title VI has been broadly construed. The jurisdictional question has on a case by case basis encompassed the "entity" reviewing the federal assistance, for instance in Adams v. Richardson, the federal agency, HUD, was sued for "consciously and expressly adopting a general policy which is in effect an abdication of its statutory duty to enforce the law." Similarly HUD has been sued in Brown v. Weinberger, 471 F. Supp. 1215 (1976) and Young v. Samuel Pierce, 544 F. Supp. 1010 (1982) and Clients' Council v. Samuel Pierce, 711 F. 2d 1406 (8th Cir. 1983).

Entire school systems have been held within the scope of Title VI as illustrated by the long line of cases subsequent to Brown v. Board of Education and when the facts are so found, the entire state has been sued under Title VI, State of Georgia v. Mitchell, 450 F. 2d 1317 (1971) or an entire university, Bob Jones University v. U.S., 396 F. Supp. 596 (1974), aff'd mem 529 F. 2d 514 (1975).

In other words, the threshold jurisdictional question is: who is the recipient of the federal financial assistance?

REGULATIONS

This approach to coverage is clearly articulated in the regulations adopted pursuant to Title VI, regulations which have been consistently challenged and upheld. Lau v. Nichols, 414 U.S. 564 (1974); Fullilove v. Klutznick, 448 U.S. 448 (1980); Guardian Association v. Civil Service Commission of the City of New York, 51 LW 5105 (1983).

The regulations, including the standard of proof, have been again and again reaffirmed. Justice Thurgood Marshall, in Guardian at 5115, gives the history of the interpretation of Title VI:

> Shortly after the enactment of Title VI, a presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination." 45 CFR Section 80.3(b)(2) (1964) (emphasis added). The Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate impact or "effects" test. See 29 Fed. Reg. 16274-16305(1964)...
>
> Following the initial promulgation of regulations adopting an impact standard, every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact. The statute has been uniformly and consistently so construed by the agencies responsible for its enforcement for nearly two decades... (emphasis added)
>
> It is also significant that this administrative interpretation of Title VI has never been altered by Congress, despite its awareness of the interpretation. In 1966, the House of Representatives defeated a proposal to alter Title VI to prohibit only intentional discrimination, and the proposal never emerged from committee in the Senate. In the Elementary and Secondary Amendments of 1969, Congress directed that guidelines and criteria established under Title VI dealing with de jure and de facto school segregation be applied uniformly across the country regardless of the origin or cause of such segregation. Pub. L. No. 91-230, Section 2, Apr. 13, 1970, 84 Stat. 121, 42 U.S.C. Section 2000d-6.

> Since the passage of the 1964 Act, Congress has also enacted 10 additional statutes modeled on Section 601 of Title VI, none of which define discrimination to require proof of intent. Although caution must be exercised when dealing with congressional inaction, we have recognized that it is appropriate to attribute significance to such inaction where an administrative interpretation "involves issues of considerable public controversy," *United States v. Rutherford*, 442 U.S. 544, 554 (1979), and Congress has not acted to correct any misinterpretation of its objectives despite its continuing concern with the subject matter, *ibid*...

TERMINATION

To understand the enforcement section of Title VI, Section 602, 42 U.S.C. 2000d-1, one must understand the principles as articulated by President John F. Kennedy:

> Simple justice requires that public funds to which all taxpayers of all races contribute, not be spent in any fashion, *which encourages, subsidizes or results in racial discrimination*. (emphasis added).

The gravamen of the enforcement section is seeking voluntary compliance. If unsuccessful an agency has discretion to seek "the ultimate sanction" or to use any other legal means to require compliance with the law. The right to bring a private cause of action is firmly established, however, as *Guardians* illustrates the right of a private litigant to seek monetary damages under Title VI is limited.

As cases have shown, fund termination is *only* available to an agency *not* a private litigant. Fund termination is available by statute, only after: an express finding on the record; opportunity for hearing and then the funds to be terminated are "pinpointed", that is, limited in its effect to the money supporting discrimination. No action shall be taken to terminate funds until voluntary compliance efforts have failed, and the House and Senate oversight committees are notified. All action is subject to judicial review.

In spite of the tale of horrors heard during these hearings there is not a plethora of fund terminations. In the 1960's the "threat" of termination was used against the still-segregated school systems. *U.S. v. Jefferson County Board of Education*, 380 F.2d. 315. The oft-cited fund termination case of *Bd. of Public Instruction of Taylor County v. Finch,* 414 F. 2d 1068 (5th Cir. 1969) illustrates the exacting nature of the required factual showing of the nexus between the federal financial assistance and the discriminatory conduct which leads to fund termination.

Mr. Chairman, I have appeared before you and other committees bemoaning the paucity of enforcement of our Constitution. The problems inherent in the civil rights laws are *not* intrusive government or overzealous bureaucrats. As *Adams* illustrates the problem has been an unconscionable disregard of the constitutional and statutory mandate that federal assistance shall not be used to unlawfully discriminate.

S. 2568 codifies the 20 years of interpretation re:the scope and effect of Title VI of the Civil Rights Act of 1964. It re-states the constitutional prohibition against federal support of illegal discrimination. The interpretation over the years has *always* excluded individual beneficiaries bottomed upon the definition section of the regulations, adopted December 4, 1964, which state:

> The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, *but such term does not include any ultimate beneficiary* under any such program. (emphasis added)

(See *Soberal-Perez v. Schweiker*, 549 F. Supp. 1164 (1982) holding an SSI beneficiary is not within the intendment of Title VI).

As stated in the legislative history as regards beneficiaries of federal financial assistance, "it is irrelevant to the purpose of these acts what the recipient does with the money he receives." 110 Cong. Rec. 6544-45 (1964).

Parenthetically, individuals, however, *are* covered as "recipients" of federal financial assistance such as for grants for research. Appendix A, 45 CFR Part 80. (grants for training personnel for the education of handicapped children; allowances to institutions training NDEA graduate fellows; grants for training in librarianship; educational research under the Cooperative Research Act; demonstration residential vocational education schools).

In the 20 years after the Civil Rights Act the value of preserving the private sector free from the constitutional requirements applicable to government has been maintained. *Wahba v. New York University*, 492 F.2d 96 (1974). In *Wahba* the court examined the issue of what constitutes government action noting that the Nobel Prize winning scientist on a NIH grant for basic research on enzymic mechanisms in biosynthesis did not *automatically* enter a joint venture with the federal government. The test of private action and the degree of government involvement the court said includes an inquiry into: the degree of government involvement, the offensiveness of the conduct (in *Wahba* plaintiff did not prove a violation of Title VI).

At the heart of the matter is the constitutional prohibition against state action supporting illegal discrimination.

One is free to think whatever one pleases, but there shall be *no* federally supported discriminatory conduct, public or private, based upon race, color or national origin. Under our Constitution, individuals, states and local governments are free, but shall not use state action to continue the incidences and badges of slavery: shall not violate the 5th or 14th Amendments.

Mr. Chairman, the NAACP supports the expeditious passage of S. 2568 to reiterate the laws and interpretation of our national commitment to the end of illegal discrimination. S. 2568 states clearly and simply that if one chooses to receive federal financial assistance a condition precedent is the enforceable promise not to prohibit participation based upon race, color, national origin, sex, age or disability.

After 20 years of life under the Civil Rights Act and over 100 years after the end of slavery any other reading of S. 2568 must be a subterfuge for disbelief in the principle of equality.

Senator HATCH. It has been brought to my attention that Dr. David Ellis, who is president of Lafayette College, has to catch a plane, so I would like to interrupt this panel and allow him to testify.

He is limited to 5 minutes and I think he can do it in that time. Doctor, we are happy to have you here. President Ellis?

STATEMENT OF DAVID ELLIS

Mr. ELLIS. Thank you, Mr. Chairman, members of the committee. I am David Ellis, president of Lafayette College in Easton, PA. I appear before you today on behalf of the American Council on Education, the National Association of Independent Colleges and Universities, as well as the other associations listed on the cover sheet of my statement.

Together, these associations represent close to 2,000 colleges, universities and organizations in higher education. I am here to express support for Senate bill 2568, the Civil Rights Act of 1984, which will clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

The four statutes that will be amended by this proposed legislation provide an important mechanism for eliminating various forms of discrimination relating to educational and employment opportunity.

Since the enactment of those laws and the promulgation of the applicable regulation, substantial progress has been made in reducing all forms of bias in our colleges, thus contributing to the initial legislative purpose of eliminating discrimination throughout the American educational system.

Lafayette College is a small, private coeducational liberal arts college in Easton, PA. We are affiliated with the Presbyterian Church and our college was founded over 150 years ago.

We at Lafayette have always believed in the preservation of private higher education as an important part of the diversity in our country's educational system.

We also are strongly committed to the elimination of any discriminatory acts or practices on any college campus in the country.

Students in the Nation's colleges and universities symbolize our Nation's future. Thus, it is our fundamental responsibility to espouse the goals of equal opportunity for educational advancement, regardless of race, sex, age, or handicap.

All must look upon those goals with great pride and respect, knowing that they serve as a constant reminder of an investment in this Nation's future.

Lafayette College perceives the advancement of equal opportunity as an integral part of that future. We, therefore, support the intent of S. 2568, the Civil Rights Act of 1984, and hope that the higher education community may serve as an example to the rest of the Nation.

It is our position that passage of this legislation is warranted at this time to insure that educational rights are protected to the fullest extent and to signify a rededication to the goals of existing civil rights statutes.

In addition, we hope that the legislative history will make it clear that this proposed legislation is neither intended to affect current exemptions for religious and single sex institutions contained in the four statutes to be amended nor is it intended to affect the tax exempt status of any institution of higher education.

Until the *Grove City* decision, there was a prevailing understanding that the receipt of Federal funds by an institution covered all programs and activities at a college or a university.

The *Grove City* decision would make coverage programs specific rather than institutionwide.

Failure to enact S. 2568 would encumber the enforcement process and disrupt educational administrative functions by causing Federal officials to attempt to trace Federal funds in all school activities.

We do, however, have some concerns relating to the enforcement process that has developed in civil rights programs during the course of the past decade, all of which we believe can be satisfied without amending the legislation.

College and university administrators have been particularly concerned with the lack of procedural fairness in the enforcement process.

We ask that the legislative history note the concerns of both the protected groups and institution with the need to establish the necessary elements of procedural due process.

Initially, we feel a need for an articulated restoration of the presumption that institutions are deemed innocent until proven guilty.

Unfortunately, enforcement personnel have, in numerous instances, departed from that presumption in the conduct of their investigations.

As an added safeguard against possible harrassment and in order to assure equitable treatment, we would request that no funds be terminated until there is a final, judicial determination as to whether a discriminatory act has occurred.

In addition, termination of funds should be limited to the program involved as is now the case.

Moreover, administrative regularity mandates the publication of a field enforcement handbook for all statutes to ensure to the extent possible that all regional offices are enforcing the law in the same manner. Over the years, it has been a constant irritant to administrators, as well as protected groups, to have conduct and remedial plans acceptable in one region of the country while being rejected in another. Similarly, to further ensure uniform enforcement, we would suggest that a system should be devised whereby all questions of first impression are forwarded to Washington for determination.

We, once again, reassert our willingness to train enforcement personnel so that they might better understand the unique ways that colleges and universities function. Institutions of higher education are not, in any way, asking for an exemption from the laws covering society as a whole, but are requesting that they be accorded even handed and appropriate treatment in any complaint investigation.

Another concern we have is the "subunit," "subdivision" categorization in the bill. If, for example, the University of California at Berkley were to be deemed out of compliance, would the entire University of California system be deemed out of compliance? Such coverage might be somewhat far-reaching, and the intent should be clarified.

Colleges and universities support the spirit and letter of all of the laws affected by S. 2568, and repledge their efforts toward fulfillment of their goals. We will continue to serve in a leadership role for the Nation, always committed to the appropriate advancement of civil rights.

Thank you for allowing me to appear before this distinguished committee.

Senator HATCH. Thank you, President Ellis. I know you have to leave, but just let me ask you one or two questions. You represent a variety of colleges across the country. I think you said some 2,000?

Mr. ELLIS. That is right.

Senator HATCH. Do any of them refuse to take "indirect" Federal aid?

Mr. ELLIS. Some of them have in the past refused to take indirect——

Senator HATCH. Do any today?

Mr. ELLIS. There are some today who do not still. You have mentioned Grove City College, for example.

Senator HATCH. They are a member of your affiliation. Can you tell us how many in your organization?

Mr. ELLIS. I do not know the exact number. We can get it for you, but it is a very small number.

Senator HATCH. Do any others refuse to take direct Federal aid?

Mr. ELLIS. Not to my knowledge.

Senator Hatch. In other words, all of your colleges are taking Federal aid and, therefore, are willing to be subject to all of title IX's rules and regulations?

Mr. Ellis. A very very large majority, yes, sir.

Senator Hatch. With the possible exception of a few colleges like Grove City?

Mr. Ellis. That is correct, sir.

Senator Hatch. Thank you.

Mr. Ellis. Thank you for your consideration.

Senator Hatch. I should have called on you first, but I am always happy to get to Ms. Simmons. We have been friends for years and I have listened to her more than any other single person. It was great to have you here.

I have to be gone for about 15 minutes. Senator Dole has indicated that he will be happy to continue to take testimony until I can get back. It involves a prior commitment to another Senator.

I hope you will forgive me, but I will come back as soon as I can. And, Senator Dole, if you have to leave, just recess, and I will be back as soon as I can and begin with whoever has not testified.

Mr. Flemming, we will take you next. I particularly apologize to you that I will not be here to listen to your testimony, but I will read it and carefully scrutinize it. I appreciate your being here.

Mr. Flemming. Thank you very much.

Senator Hatch. And anybody else who I miss while I am gone.

STATEMENT OF ARTHUR FLEMMING

Mr. Flemming. Mr. Chairman, Senator Dole, I appreciate very much the opportunity to appear before this subcommittee in order to present my views on S. 2568, the Civil Rights Act of 1984.

This legislation is intended to restore four major civil rights statutes to the scope of coverage that was originally intended by Congress and that characterized their administration prior to the Supreme Court decision in *Grove City College* v. *Bell.*

I support, without reservation, the enactment of this legislation. Unless it is enacted, we will move backwards instead of forward in combating institutional discrimination in the delivery of services supported by Federal funds.

Until the decision of the Supreme Court in the *Grove City College* case. It was assumed that if an educational institution received financial assistance for any of its programs the entire institution would be subject to the provision of title IX.

However, as a result of the Supreme Court decision, it is now assumed that if an educational institution receives Federal financial assistance for just one program, it can ignore title IX for all of its other programs.

It is also assumed that this same line of reasoning would be used in determining the jurisdiction of the Federal Government under title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975.

It is my understanding that the executive branch has curtailed already its enforcement programs based on this assumption.

If the Congress of the United States continues to permit the enforcement of these laws to be based on such an assumption, the citizens of our Nation will be convinced that the Federal Government has decided to walk away from the Constitutional obligations defined in *Brown* v. *The Board of Education* and subsequent opinions.

If the Congress fails to respond to the *Grove City* decision, it is clear that the Nation will take a long backward step in implementing civil rights laws in the area of the delivery of service.

This cannot and should not be permitted to happen. Title IX has been the catalyst for gains in achieving equal opportunities for women students and employees in schools and colleges across the Nation.

What has happened, however, simply constitutes a fair start. A great deal more remains to be done.

If Congress does not respond to the *Grove City* decision, we know that one institution after another will decide that it is no longer necessary to adjust their programs and administrative practices in order to meet the objectives of title IX.

Prior to the inclusion of title VI in the Civil Rights Act of 1964, racial discrimination in programs designed to provide health, welfare, and educational services to our people was rampant.

Title VI prohibited such practices. Some of them have come to a halt as a result of the implementation of this title.

Many of these practices still continue. If the *Grove City* decision continues to be the law of the land, we could very easily find ourselves reverting to the type of institutional discrimination that confronted us prior to 1964.

How can we justify a policy that would say to the institutions involved in federally supported service programs in these areas, "All you need to do is avoid discrimination in the areas where you receive Federal funds. You are free to practice discrimination at will in all other areas of your institution."

We would not only be tolerating, we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to deliver services to its citizens.

We know that it has been necessary to combat institutional discrimination in institution after institution in connection with the implementation of section 504 of the 1973 Rehabilitation Act.

This act has been and continues to be a challenge to the status quo. All kinds of reasons have been advanced by institutions for not complying with the provisions of the act.

The Congress would certainly be replacing hope with dispair in the lives of the handicapped if it permitted the *Grove City* decision to be applied to the enforcement of this very important piece of legislation.

In 1978, as a result of a directive from the Congress, the U.S. Commission on Civil Rights, of which I was then serving as chairman, conducted field studies and held public hearings to determine the extent to which ageism existed in the administration of programs financed by Federal funds.

As a result of these studies and hearings, we concluded that discrimination on the basis of age was widespread and that these discriminatory practices were having an adverse impact on the lives of older persons.

For example, in the field of mental health we found that in community mental health clinics, on an average, only 4 or 5 percent of the total number of persons being served were over 65.

The executive branch has made very little progress in implementing the Age Discrimination Act in such a manner as to open up services to older persons.

If the *Grove City* decision should be applied to the act, it would mean that it would be virtually impossible to convince the executive branch that it should get off dead center as far as the implementation of this very important piece of legislation is concerned.

I am convinced that this legislation does only one thing and that is to put us back where we were as far as the implementation of these four statutes are concerned prior to the *Grove City College* case.

Let's get back to where we were and then insist on a more effective and vigorous enforcement of these four statutes than has been the case in the past.

There is no justification, legally or morally, for the Federal Government to permit those who operate programs it supports to practice racism, sexism, ageism or shut the doors of opportunity to the handicapped.

I urge this committee and the Congress to give the Nation a clear signal that it means business when it comes to providing the legislative foundation for implementing statutes that are designed to combat institutional discrimination in the delivery of services by passing this bill by an overwhelming majority.

Senator Dole [presiding]. Thank you, Dr. Flemming.

Mr. FLEMMING. You are welcome.

Senator DOLE. Without objection, the statement of Arthur Flemming will be inserted into the record at this point.

[The statement of Arthur Flemming follows:]

PREPARED STATEMENT OF ARTHUR S. FLEMMING

I appreciate very much the opportunity to appear before the Subcommittee on the Constitution of the Senate Committee on the Judiciary in order to present my views on S. 2568, the "Civil Rights Act of 1984".

This legislation is intended to restore four major civil rights statutes--Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the 1973 Rehabilitation Act, as amended in 1978; and the Age Discrimination Act of 1975--to the scope of coverage that was originally intended by Congress and that characterized their administration prior to this Supreme Court decision in Grove City College vs. Bell.

I support without reservation the enactment of this legislation. Unless it is enacted we will move backwards instead of forward in combating institutional discrimination in the delivery of services supported by Federal funds.

As we observe the 30th Anniversary of Brown vs. Board of Education we know that there are many of our citizens who question the Federal Government's continuing commitment to the attainment of the objectives embodied in that landmark decision.

Until the decision of the Supreme Court in the Grove City College case it was assumed that if an educational institution received financial assistance for any of its programs the entire institution would be subject to the provisions of Title IX. However, as a result of the Supreme Court decision it is now assumed that if an educational institution receives federal financial assistance for just one program it can ignore Title IX for all of its other programs. It is also assumed that this same line of reasoning would be used in determining the jurisdiction of the Federal Government under Title VI of the Civil Rights Act of 1964, Section 504 of the 1973 Rehabilitation Act, as amended in 1978 and the Age Discrimination Act of 1975. It is my understanding that the Executive Branch has curtailed already its enforcement programs based on this assumption.

If the Congress of the United States continues to permit the enforcement of these laws to be based on such an assumption the citizens of our nation will be convinced that the Federal Government has decided to walk away from the constitutional obligations defined in Brown vs. Board of Education and subsequent opinions. If the Congress fails to respond to the Grove City decision it is clear that the nation will take a long backward step in implementing civil rights laws in the area of the delivery of services. This cannot and should not be permitted to happen.

Title IX has been the catalyst for gains in achieving equal opportunities for women students and employees in schools and colleges across the nation. What has happened however simply constitutes a fair start. A great deal more remains to be done. If Congress does not respond to the Grove City decision we know that one institution after another will decide that it is no longer necessary to adjust their programs and administrative practices in order to meet the objectives of Title IX.

Prior to the inclusion of Title VI in the Civil Rights Act of 1964, racial discrimination in programs designed to provide health, welfare and educational services to our people was rampant. Title VI prohibited such practices. Some of them have come to a halt as a result of the implementation of Title VI. Many of these practices still continue. If the Grove City decision continues to be the law of the land we could very easily find ourselves reverting to the type of institutional discrimination that confronted us prior to 1964. How can we justify a policy that would say to institutions involved in federally-supported service programs in these areas: all you need to do is avoid discrimination in the areas where you receive Federal funds; you are free to practice discrimination at will in all other areas of your institution! We would not only be tolerating--we would be putting an official stamp of approval on discriminatory practices by institutions that are helping the Federal Government to deliver services to its citizens.

We know that it has been necessary to combat institutional discrimination in institution after institution in connection with the implementation of Section 504 of the 1973 Rehabilitation Act, as amended in 1978. This Act has been and continues to be a challenge to the status quo. All kinds of reasons have been advanced by institutions for not complying with the provisions of the Act. The Congress would certainly be replacing hope with despair in the lives of the handicapped if it permitted the Grove City decision to be applied to the enforcement of this very important piece of legislation.

In 1978, as a result of a directive from the Congress, the U. S. Commission on Civil Rights, which I was then serving as Chairman, conducted field studies and held public hearings to determine the extent to which ageism existed in the administration of programs financed by Federal funds. As a result of these studies and hearings, we concluded that discrimination on the basis of age was widespread and that these discriminatory practices were having an adverse impact on the lives of older persons. For example in the field of mental health we found that in community mental health clinics on an average only four or five percent of the total number of persons being served were over 65.

The Executive Branch has made very little progress in implementing the Age Discrimination Act in such manner as to open up services to older persons. If the Grove City decision should be applied to the Act it would mean it would be virtually impossible to convince the Executive Branch that it should get off dead center as far as the implementation of this very important piece of legislation is concerned.

I am convinced that this legislation does only one thing and that is to put us back where we were as far as the implementation of these four statutes are concerned prior to the Grove City College case. Let's get back to where we were and then insist on a far more effective and vigorous enforcement of these four statutes than has been the case in the past. There is no justification--legally or morally--for the Federal Government to permit those who operate programs it supports to practice racism, sexism, ageism or shut the doors of opportunity to the handicapped.

I urge this Committee and the Congress to give the nation a clear signal that it means business when it comes to providing the legislative foundation for implementing statutes that are designed to combat institutional discrimination in the delivery of services by passing this bill by an overwhelming majority.

STATEMENT OF JUDITH LICHTMAN

Ms. LICHTMAN. My name is Judith Lichtman. I am the executive director of the Women's Legal Defense Fund.

S. 2568 is important because it repairs the serious damage caused by the Supreme Court's *Grove City College* decision and ensures that the narrow interpretation accorded title IX will not be applied to title VI of the Civil Rights Act of 1964, section 594 of the Rehabilitation Act of 1973, as amended, or the Age Discrimination Act.

We urge the quick passage of this bill to ensure that these four statutes continue to provide the same protections that were afforded before the decision was issued in *Grove City*.

I will use this opportunity to respond to some of the questions posed by the U.S. Commission on Civil Rights and the Justice Department during their testimony and in their written submissions.

Let me first respond to the critics of the bill who assert it is unclear and uses words new to this type of legislation.

Many cosponsors have repeated over and over that the bill is intended to restore title IX to its former vitality and clarify congressional intent regarding the other three cross-cutting statutes. It is not breaking the ground.

Moreover, this result is assured because the bill wisely retains the current structure and uses language drawn from current regulations and court cases so that prior interpretations of the language can be used in the future.

It is designed to conserve both administrative and judicial resources. The few changes made are only those necessitated by the *Grove City* decision's narrowing of the term "program or activity."

That phrase was replaced by terms already in use at the administrative agencies and by language and concepts taken from prior judicial interpretations.

The term "recipient" has been used for two decades and the word "supports" is taken from the case of *Board of Public Instruction* v. *Taylor—Taylor County* v. *Finch*.

Sponsors have repeatedly assured their colleagues that this bill is not intended to expand the law from its traditional meaning.

Those assurances serve to neutralize the claims of expansion.

Some assert that the inclusion of elementary and secondary schools, preschools, colleges, academies, vocational institutions and State and local educational agencies is assumed by the sponsors and readers of the bill, but that the coverage of educational components of prisons and other entities whose primary purpose is not education, needs clarification.

The educational component of a prison is covered by the title IX prohibition whenever that prison receives any Federal aid whether or not it is funding designated for the classrooms.

But the application of title IX extends only to the educational activities and no further.

Questions have also been raised as to whether this bill broadens the scope of coverage by extending for the first time the title IX prohibition to the commercial activities of educational institutions.

The Department of Agriculture's title IX regulations leave no question as they provide that: "'Education program or activity' means every program or activity operated by an educational recipient."

Title IX has always covered such activities to the extent that they are part of the educational entity itself and there is no change in that coverage made by S. 2568.

Moreover, with such "commercial" activities, including student housing, cafeterias, et cetera, not only are these activities hard to separate from the educational pursuits of the entity, but the process of distinguishing one from another could embroil both the recipient and the agency in an inquiry using valuable resources that could be better used by all the parties.

This is not a change in the law nor an unmanageable set of new obligations as some critics assert.

The Justice Department analysis questions the rationale for dropping the phrase in the regulatory definition of recipient, "does not include any ultimate beneficiary under such program."

First it should be noted that that phrase is far from crucial. In fact, it does not even appear in the title IX definition of "recipient."

Moreover, the phrase "ultimate beneficiary" is itself confusing.

If the language were in, then there would have to be clarification that Grove City College, the ultimate beneficiary of BEOG, was still a recipient, whereas the student who received the BEOG was not.

The drafters chose to make clear under the language of the act that Grove City was a recipient even if viewed as the ultimate beneficiary of BEOG and that hospitals were recipients even if viewed as ultimate beneficiaries of Federal medicare and medicaid funds under the act.

By moving the term "person," the definition of "recipient" establishes that the individual student or medicare recipient is not a "recipient."

In addition, the definition of recipient does not reach the clothing storekeeper paid with the proceeds of a welfare check as has been suggested.

Since the Congress is not overturning that part of the *Grove City* decision that held the college was a recipient of Federal assistance, the Supreme Court's analysis of recipient is adopted.

The Justice Department repeatedly suggests that language in the bill could be subject to a reading which differs from the reading or meaning stated to be intended by the cosponsors.

Many pieces of legislation have been drafted by choice or out of necessity using language which could be accorded more than one meaning.

But once the sponsors make their intentions clear—as has been the case with S. 2568—the language is so defined.

Justice Department officials are raising these issues to attempt to create ambiguity that does not exist and that sponsors have already addressed in their statements.

This is particularly true with regard to the fund termination remedy. The cosponsors have stated and restated that the same pinpointing requirement, that preexisted *Grove City,* would be continued.

The language in the termination portions of the laws had to be changed because the presence of the word "program" resulted in a far more limited remedy than what had been available before *Grove City* narrowed the interpretation of "program or activity."

The new language was taken from one of the few cases on fund termination, *Taylor County* v. *Finch,* further confirming the congressional intent to retain the same remedy with no change in its scope or application.

As was true before *Grove City,* so, too, under S. 2568 only those funds that support the discrimination found may be terminated.

The Justice Department is wrong in its assertion that "under this interpretation discrimination by a single subunit or instrumentality of a State could result in termination of Federal aid to the State, including aid to its other subunits or instrumentalities not in violation."

Two examples help to explain why. If the county A Health Department receives Federal funds as a subrecipient of State Health Department, for health services and discrimination which is supported with Federal funds is found in that county A Health Department, then county A's Health Department may have its Federal funds terminated.

The State Health Department's Federal funds would not be terminated unless it could be shown that discriminatory State policies or practices existed as well. Nor would Federal funds in health departments in counties B through Z be terminated because of county A's discriminatory practices if there was no discrimination in those counties.

Further, the Federal funding in county A's police and fire departments would not be subject to termination, because discrimination practiced by the health department is not supported by the Federal funding in the police or fire departments in county A.

Similarly, findings of discrimination in city E's transportation services agency may lead to termination of Federal funding awarded to that agency for transportation in city E, but would not jeopardize Federal funding to city E's mental health or sanitation departments or schools.

If cities F through L in the same State also get Federal transportation assistance from the State Department of Transportation, their funds would be safe, absent any findings of discrimination being supported with Federal assistance in each of these cities.

Moreover, the State agency which divided its Federal transportation assistance between cities E, F, G, H, I, J, K, and L would not lose its Federal funding, as long as the State did not discriminate.

The Justice Department——

Senator Dole. I wonder if we could summarize. We have nine more witnesses and some may want to have dinner.

Ms. Lichtman. My only reason for going into this in such excruciating detail is really to answer Senator Hatch's——

Senator Dole. He is not here. [Laughter.]

Ms. Lichtman [continuing]. Concern about—but I am sure Mr. Markman would tell him. [Laughter.]

In closing, and I will close, I wish to emphasize the importance of this legislation to the beneficiaries of this bill.

Litigation in the pipeline on numerous cases in which important civil rights are at issue is being challenged by recipients as this committee hearing takes place.

Recipients which had believed that they had to comply with the law now assert after *Grove City* that they have no obligation to obey the civil rights statutes being amended by S. 2568.

News reports state that the Department of Education has notified 23 recipients, although Secretary Bell today testified that there are 18, that ongoing investigations are being closed because the Department now takes the position that it lacks jurisdiction after *Grove City*.

In each and every case, there are students, teachers or other staff without protection that they had this past fall. It is very important, therefore, that this bill be passed quickly in its current form to assure that we do not move backward and slip away from the promises of equality that the Congress gave us in 1964, 1972, 1973, and 1975, when these basic civil rights laws were enacted.

Senator Dole, I know that Senator Hatch is not here, but he raised the prospect of——

Senator DOLE. But we do have other witnesses that we need to hear—maybe we could come back to you. Let's go on to Patrisha Wright.

Senator KENNEDY. Senator Dole, I know we want to hear from the whole panel.

Senator DOLE. Right.

Senator KENNEDY. I just wanted one question.

Senator DOLE. Certainly.

Senator KENNEDY. Maybe you can supply a more complete answer. With regard to the vagueness issue and the various definitions that seems to be the target of Mr. Reynolds' testimony here and previously, those of us who are supporting the legislation feel that the language is adequate, it is specific, and any further explanation should be spelled out in the report.

Many of the arguments that are raised today are similar to the arguments that were raised at the time we passed these statutes initially.

If you could just address the issue of specificity on this, if you could make a comment on that and if the other panelists could make a comment on it, I think it would be valuable in terms of this record.

Perhaps you might submit a more detailed response to Mr. Reynolds' testimony, which I hope the record would be open to receive.

Ms. LICHTMAN. I think the legislation, as drafted and as the 63 cosponsors support it, is really quite specific, and should there be a need for clarification it can very well take place in either the committee report or in the colloquy on the floor.

None of Mr. Reynolds' problems rise, to me, to the level of the amendments to this legislation. I think most of them are wrongheaded, misguided, and exaggerated notions of problems dreamt up by someone who is not really interested in passing this legislation.

Senator KENNEDY. I hope in their testimony, given the time limits, Senator Dole, that they might address that issue as well, because I think—it is the basic kind of question that we are going to have to address. Thank you.

Senator DOLE. Without objection, the statement of Judith Lichtman will be inserted into the record at this point.

[The statement of Judith Lichtman follows:]

PREPARED STATEMENT OF JUDITH LICHTMAN

Chairman Hatch and members of the Subcommittee, thank you for the opportunity to testify here today on S. 2568. I am Judith Lichtman, Executive Director of the Women's Legal Defense Fund. The Fund is a membership organization founded in 1971 to advance women's rights. It is committed to equality and supports strong enforcement of all our civil rights laws so that women of color, those who are disabled and older women will be protected from race, handicap, age and sex discrimination. The Fund works in coalition with other organizations similarly committed to civil rights of all Americans. My own professional experience includes a three year stint with the U.S. Commission on Civil Rights between 1969 and 1972, when I worked throughout the South on school desegregation.

.S. 2568 is important because it repairs the serious damage caused by the Supreme Court's Grove City College v. Bell decision and ensures that the narrow interpretation accorded Title IX will not be applied to Title VI of the Civil Rights Act of 1964 Section 504 of the Rehabilitation Act of 1973 as amended, or the Age Discrimination Act. We urge the quick passage of this bill to ensure these four statutes continue to provide the same protections that were afforded before the decision was issued in Grove City College v. Bell.

I will use this opportunity to respond to some of the questions posed by the U.S. Commission on Civil Rights and the Justice Department during their testimony and in their written submissions. Let me first respond to the critics of the bill who assert it is unclear and uses words new to this type of legislation. Many co-sponsors have repeated over and over that the bill is intended to restore Title IX to its former vitality, and clarify congressional intent regarding the other three cross-cutting statutes. It is not breaking new ground.

Moreover, this result is assured because the bill wisely retains the current structure and uses language drawn from current regulations and court cases so that prior interpretations of the language can be used in the future. This approach avoids having to start with an entirely fresh slate. It is designed to conserve both administrative and judicial resources. The few changes made are only those necessitated by the Grove City decision's narrowing of the term "program or activity." That phrase was replaced by terms already in use at the administrative agencies and by language and concepts taken from prior judicial interpretations. The term "recipient" has been used for two decades and the word "supports" is taken from the Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969). Sponsors have repeatedly assured their colleagues that this bill is not intended to expand the law from its traditional meaning. Those assurances serve to neutralize the claims of expansion. Moreover, the clarification sought by such entities as the U.S. Civil Rights Commission can be provided simply and quickly through legislative history -- no amendments are necessary. I wish to emphasize that the Commission did not call for amendments. They merely advised on the need for clarification.

Let me turn now to some of the points on which the Commission and the Department of Justice seek clarification.

Education Recipient

Some assert that the inclusion of elementary and secondary schools, preschools, colleges, academies, vocational institutions and state and local education agencies is assumed by the sponsors and readers of the bill, but that the coverage of educational components of prisons and other entities whose primary purpose is not education, needs clarification. As Senator Kennedy stated in his explanation at the time the bill was introduced, the educational component of a prison is covered by the Title IX prohibition whenever that prison receives any federal aid, whether or not it is funding designated for the classrooms. But the application of Title IX extends only to the educational activities and no further.[1] This limitation has been made clear by Senator Kennedy's statement and can be asserted throughout the legislative history in response to the U.S. Commission for Civil Rights testimony.[2]

Questions have also been raised as to whether this bill broadens the scope of coverage by extending for the first time, the Title IX prohibition to the commercial activities of educational institutions. Although the Civil Rights Commission questions whether coverage was so extensive under Title IX, the Department of Agriculture's Title IX regulations leave no question as they provide that: "'Education program or activity' means: (1) every program or activity operated by an educational recipient." 7 C.F.R. §15a.2(q).

Title IX has always covered such activities to the extent they are a part of the educational entity itself, and there is no change in that coverage made by S. 2568. Moreover, with such "commercial" activities, including student housing, cafeterias, etc., not only are these activities hard to separate from the educational pursuits of the entity, but the process of distinguishing one from another could embroil both the recipient and the agency in an inquiry using valuable resources that could be better used by all parties. Imposition of such a limitation would engage the government in numerous threshold disputes on coverage of just the sort this bill is designed to eliminate. This is not a change in the law nor an unmanageable set of new obligations as come critics assert.

Recipient Definition

The Justice Department analysis questions the rationale for dropping the phrase in the regulatory definition of recipient, "does not include any ultimate beneficiary under such

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1/ Statement of Sen. Kennedy, Cong. Rec. S. 4586 (Daily Ed. April 12, 1984).

2/ Testimony of Linda Chavez Before Senate Judiciary Subcommittee on the Constitution, May 30, 1984, p. 7.

program."[3] First, it should be noted that that phrase is far from crucial. In fact, it does not even appear in the Title IX definition of "recipient." Moreover, the phrase "ultimate beneficiary" is itself confusing. If the language were in, then there would have to be clarification that Grove City College, the "ultimate beneficiary" of BEOG's, was still a recipient, whereas the student who received the BEOG was not. The drafters chose to make clear under the language of the Act that Grove City was a recipient even if viewed as the ultimate beneficiary of BEOG's and that hospitals were recipients even if viewed as ultimate beneficiaries of federal Medicare and Medicaid funds under the Act. By moving the term "person," the definition of "recipient" establishes that the individual student or Medicare recipient is not a "recipient." In addition, the definition of recipient does not reach the clothing storekeeper paid with the proceeds of a welfare check, as has been suggested. Since the Congress is not overturning that portion of the Grove City decision that held the College was a recipient of federal assistance, the Supreme Court's analysis of "recipient" that it quotes is adopted.

> Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the recipient of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately receive federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individuals' eligibility for general assistance is not tied to attendance at an educational institution.

Grove City College v. Bell, 104 S.Ct. 1211, 1217-18 n.13.

Interagency Coordination

The Justice Department faults the bill for failing to provide a mechanism to promote interagency referrals that would "serve to alleviate the concern over inexpert or duplicative agency complaint investigations."4/ No such provision is needed in the statutes because one is already in place for Title VI, Title IX and §504, in the form of Executive Order 12250. In fact, it is surprising to find the Department of Justice overlooking this Order when it is precisely that agency to which such coordination authority and responsibilities has been assigned. The Order directs Justice to coordinate enforcement of the three statutes. This authority is sufficient to promote the creation of deferral mechanisms and interagency cooperation that will address the issues raised by Justice. Regulations establishing a mechanism to streamline procedures and prevent interagency overlap between EEOC and the federal funding agencies under Title IX and Title VI became effective March 28, 1983. 48 Fed. Reg. 3570 (1983). Jointly promulgated by EEOC and Justice these regulations demonstrate that the federal agencies can and do develop working relationships that minimize overlap and maximize the use of resources with the necessary expertise, notwithstanding the formal administrative boundaries of federal agencies. The Civil Rights Division of the Justice Department has an entire unit of employees designated as the Coordination and Review Unit which has responsibility for implementation of Executive Order 12250. It is amazing that Mr. McConnell could have forgotten about it.

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[3] Letter to Senator Hatch from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs ("McConnell letter"), May 24, 1984, p. 10 n.10.

Ambiguity in Fund Termination

Justice repeatedly suggests that language in the bill could be subject to a reading which differs from the reading or meaning stated to be intended by the co-sponsors. Many pieces of legislation have been drafted, by choice or out of necessity using language which could be accorded more than one meaning.5/ But once the sponsors make their intentions clear -- as has been

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4/ McConnell letter, p. 18.

5/ *See e.g.* McConnell letter, pp. 13, 14 n. 12.

the case with S. 2568 -- the language is so defined. Justice officials are raising these issues to attempt to create ambiguity that the does not exist, and that sponsors have already addressed through their statements. Even the Justice Department acknowledges that such analysis is in the record as, e.g. McConnell letter p. 14 n.13.

This is particularly true with regard to the fund termination remedy. The co-sponsors have stated and restated that the same pinpointing requirement that preexisted Grove City would be continued. The language in the termination portions of the laws (§§602, 902, 505(a)(2) and 6104(b)) had to be changed because the presence of the word "program" resulted in a far more limited remedy than what had been available before Grove City narrowed the interpretation of "program or activity." The new language was taken from one of the few cases on fund termination, Taylor County v. Finch, supra, further confirming the congressional intent to retain the same remedy with no change in its scope or application. As was true before Grove City, so, too, under S. 2568 only those funds that support the discrimination found may be terminated.

The Justice Department is wrong in its assertion that "[u]nder this interpretation discrimination by a single subunit or instrumentality of a state could result in termination of all federal aid to the state, including aid to its other subunits or instrumentalities not in violation."6/ Two examples help to explain why.

If the County A Health Department receives federal funds as a subrecipient of the State Health Department for health services and discrimination which is supported with federal funds is found in that County A health department, then County A's health department may have its federal funds terminated. However, the State Health Department's federal funds would not be terminated, unless it could be shown that discriminatory State policies or practices as well. Nor would federal funds in health departments in Counties B through Z be terminated because of County A's

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6/ McConnell letter, p. 13.

discriminatory practices if there was no discrimination in those counties. Further, the federal funding in County A's police and fire departments would not be subject to termination, because discrimination practiced by the health departments is not supported by the federal funding in the police or fire departments in County A. Similarly, findings of discrimination in City E's transportation services agency may lead to termination of federal funding awarded to that agency for transportation in City E, but would not jeopardize federal funding for City E's mental health or sanitation departments, or schools. If Cities F-L in the same State also get federal transportation assistance from the State Department of Transportation, their funds would be safe, absent any findings of discrimination being supported with federal assistance in each of these cities. Moreover, the State agency, which divided its federal transportation assistance between cities E, F, G, H, I, J, K and L, would not lose its federal funding, as long as the state did not discriminate.

Justice persists in raising strawmen like this exaggeration of the consequences of fund termination. The fund termination under these laws as amended will be no different or more sweeping than fund termination was before the Grove City decision. Issues like these are false ones.

* * * *

In closing, I wish to emphasize the importance of this legislation to the beneficiaries of this bill. Litigation in the pipeline on numerous cases in which important civil rights are at issue is being challenged by recipients as these Committee hearings take place. Recipients which had believed they had to comply with the law, now assert after Grove City that they have no obligations to obey the civil rights statutes being amended by S.2568. News reports state the Department of Education has notified 23 recipients that ongoing investigations are being closed because the Department now takes the position it lacks jurisdiction after Grove City.7/ In each and every case there are students, teachers or other staff, without protections that they had this past fall.

It is very important, therefore, that this bill be passed quickly in its current form to assure that we do not move backwards and slip away from the promises of equality that the Congress gave us in 1964, 1972, 1973, and 1975 when these basic civil rights laws were enacted.

7/ New York Times, Sunday June 3, 1984 p. A36, cols. 1-2.

STATEMENT OF PATRISHA WRIGHT

Ms. WRIGHT. My name is Pat Wright, and I am the director of governmental affairs for the Disability Rights Education and Defense Fund.

I have submitted full testimony to the committee on behalf of DREDF and 17 other national disability organizations and request that it be included in the record.

Senator DOLE. Without object we will have that information inserted in the record at this point.

[The information follows:]

WRITTEN TESTIMONY
SUBMITTED BY THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND
ON BEHALF OF:

- American Coalition of Citizens with Disabilities
- American Speech-Language-Hearing Association
- Association of Citizens with Learning Disabilities
- Association of Retarded Citizens
- Council on Exceptional Children
- Conference of Education Administrators Serving the Deaf
- Epilepsy Foundation of America
- National Society for Children and Adults with Autism
- National Easter Seals Society
- National Council on Rehabilitation Education
- National Rehabilitation Association
- The Convention of American Instructors of the Deaf
- The National Association of Private Residential Facilities for the Mentally Retarded
- United Cerebral Palsy Association, Inc.

The Disability Rights Education and Defense Fund (DREDF) is a national research, education, community organizing, and advocacy organization. DREDF provides direct information and support to a network of 4,000 disabled individuals and community-based organizations throughout the United States on disability civil rights issues and works closely with other national organizations representing disabled people, as well as civil rights organizations and defense funds who work on behalf of other disenfranchized persons.

This written testimony on the 1984 Civil Rights Act (H.R. 5490 and S. 2568) which supplements the oral testimony of Arlene B. Mayerson (DREDF), directing attorney, is submitted on behalf of the following national organizations:

- American Coalition of Citizens with Disabilities
- American Speech-Language-Hearing Association
- Association of Citizens with Learning Disabilities
- Association of Retarded Citizens
- Council on Exceptional Children
- Conference of Education Administrators Serving the Deaf
- Epilepsy Foundation of America
- National Society for Children and Adults with Autism
- National Easter Seals Society
- National Council on Rehabilitation Education
- National Rehabilitation Association
- The Convention of American Instructors of the Deaf
- The National Association of Private Residential Facilities for the Mentally Retarded
- United Cerebral Palsy Association, Inc.

The purpose of the written testimony set forth below is to fully document the importance of Section 504 of the 1973 Rehabilitation Act in assuring equal opportunity to 36 million disabled Americans and the devastating effect that the Supreme Court's decision in Grove City College has in attaining this Congressional goal. A review of the legislative history of Section 504 and the administrative interpretations which have been endorsed by Congress demonstrate that Congress intended Section 504 to broadly prohibit disability-based discrimination by all recipients of federal funds.

INTRODUCTION

The basic purpose of the 1984 Civil Rights Act of (H.R. 5490 and S. 2568) is to reaffirm this nation's commitment to equality of opportunity by assuring that recipients of federal financial assistance are prohibited from discriminating on the basis of race, national origin, sex, disability or age. Such discrimination is currently prohibited by Title VI, 42 U.S.C. §2000d, Title IX, 20 U.S.C. §1681 et. seq., §504 of the 1973 Rehabilitation Act, 29 U.S.C. §794, and the Age Discrimination Act, 42 U.S.C. §6101 et. seq.. Each of these statutes bars discrimination in any program or activity receiving federal financial assistance. However, on February 28, 1984 the U.S. Supreme Court decided Grove City College v. Bell. 465 U.S., 104 S. Ct 1211, which gives an unduly restrictive interpretation to the term "program or activity" in Title IX. The court held that a college which receives federal money only in the form of student financial aid is a recipient of federal financial assistance under Title IX, but that under these circumstances, the only part of the college which is covered by Title IX is the student financial aid program. The rest of the college is free to discriminate on the basis of sex. Because Title IX, §504 and the Age Discrimination Act are all modeled after Title VI which contains the "programs or activity" language, the Grove City decision has grave implications for all of this nation's primary antidiscrimination statutes. Under the Court's interpretation in Grove City College, the Congressional purpose in enacting these statutes--to assure that federal funds do not aid discrimination--would be defeated. A university receiving substantial amounts of federal aid could discriminate against blacks, women or disabled people in its medical or law schools so long as these programs were kept free of federal funds. After years of progress in opening the doors to these formerly disenfranchised groups, the Court's decision threatens to shut them once again. H.R. 5490 and S. 2568 simply reaffirm the purpose of these statutes to broadly prohibit discrimination by all those who choose to accept federal financial assistance.

Amendment to §504 Contained in 1984 Civil Rights Act (S. 2568 and H.R. 5490)

In order to assure Congress' original intent that §504 prohibit discrimination on the basis of disability by all recipients of federal financial assistance, H.R. 5490 (Section 504) is amended by striking out "the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving" and inserting in lieu thereof "participation, be denied benefits, or be subject to discrimination by any recipient of."

Section 504 of the Act would be further amended by inserting "(a)" after the section designated and by adding at the end thereof the following new subsection:

> "(b) For the purpose of this section the term 'recipient' means any State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom federal financial assistance is extended directly or through another recipient, including any subunit, successor, assignee, or transferee thereof."

This is in direct conformity with the amendments offered as part of S. 2568 and H.R. 5490 on Titles VI and IX and the Age Discrimination Act.

Section 505(a)(2) is amended by adding "as amended" after Title VI of the Civil Rignts Act of 1964.

Section 602 of Title VI is being amended by H.R. 5490 and S. 2568 to clarify the statutes remedial purpose and the scope of the termination authority. Section 602 of Title VI is amended to read:

> "Each federal department and agency which is empowered to extend federal financial assistance to any recipient, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such recipient by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance to any recipient as to which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to which such a finding has been made, and shall be limited in its effect to the particular assistance which supports such noncompliance so found, or (2) by any other means authorized by law:
>
> Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

Since the procedural complaint and enforcement regulations under Title VI which are incorporated by reference into the §504 regulations are authorized by virtue of Section 602, it is necessary to incorporate the specific Title VI amendment into §505(a)(2). This is the only purpose of this amendment. As recognized by the Supreme Court in Consolidated Rail Corporation v. Darrone, the purpose of §505(a)(2) is to "enhance the ability of handicapped individuals to assure compliance with Section 504." S. Rep. No. 95-890 at 18.

SECTION 504 PROHIBITS RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE FROM DISCRIMINATING ON THE BASIS OF HANDICAP

The Legislative History of Section 504 Evidences Congressional Intent To Broadly Prohibit Discrimination on The Basis of Handicap by Recipients of Federal Financial Assistance

The legislation which became the Rehabilitation Act of 1973 was vetoed twice by President Nixon before it was signed into law on September 26, 1973. (Pub. Law No. 93-112) Sen. Rep. No. 93-318, 93rd Cong., 1st Sess. Reprinted in 1973 U.S. Code Cong. and Ad. News 2076, 2086-2090. Section 504 was included in all three versions of the act.[1]

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[1] Prior to the inclusion of Section 504 in the Rehabilitation Act of 1973, attempts were made to include it as an amendment to Title VI of the Civil Rights Act of 1964. H.R. Rep. No. 12154, 92nd Cong., 1st Sess, 117 Cong. Rec. 45945, 45974-75 (1971) (introduced by Rep. Vanick); S. 3044, 92nd Cong., 2d Sess, 118 Cong. Rec. 525-26 (1972) (introduced by Senators Humphrey and Percy). The sponsors indicated a broad-based policy of nondiscrimination. See, eg. statement by Senator Percy:

The intent to ban discriminatory policies and practices in order to assure equal opportunity to disabled citizens is evident throughout the legislative history. As part of its consideration of the Rehabilitation Act of 1973, the Senate Committee on Labor and Public Welfare heard extensive testimony regarding the operation of vocational rehabilitation programs. The Senate report on the 1973 Act summarized the problems which were highlighted in these hearings including:

> the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., *employment discrimination*, lack of housing and transportation services and architectural and transportational barriers. Sen. Rep. No. 318, 93rd Congress, 2nd Sess. (1973), *reprinted in* U.S. Cong. and Ad. News at 2076

Congress responded to this problem by enacting provisions prohibiting discrimination. There can be no doubt that Section 504 was intended to broadly ban discrimination. Senator Harrison Williams, chairman of the full Committee on Labor and Public Welfare and the leading sponsor of the Act summarized:

> This landmark legislation, introduced by Congressman Vanik in the House, would prohibit discrimination against the mentally and physically handicapped in programs which receive federal aid.
>
> The amendment we are introducing today would...(guarantee) the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse and degradation.

118 Cong. Rec. 526 (1972).

> The committee also found it necessary to place special emphasis on target populations whose needs were not being met, and to grapple with problems, which while not related solely to rehabilitation, pose serious problems for handicapped individuals in becoming employed, staying employed, and generally supporting themselves within their communities. In this respect, the committee payed (sic) special attention to the problems of employment discrimination, lack of housing and transportaion facilities, and the prevalance of architectural and transportation barriers. Id. at 2457-24588.

Senator Alan Cranston, a primary sponsor of §504, noted that simple extention of the existing 53-year-old Vocational Rehabilitation Act was not enough to insure equal opportunities for handicapped persons.

> (S)uch problems as unfounded discrimination in employment and in housing, difficulties of access to centers, and duplication and fragmentation of services across program lines were voiced repeatedly to the committee...119 Cong. Rec. 5882 (1973) (emphasis provided).

Moreover, it was recognized that discrimination had an especially detrimental impact on the vocational rehabilitation program.

As stated by Senator Cranston:

> (D)iscrimination in placement, hiring and advancement continues to limit the vocational rehabilitation program's ability to effect successful rehabilitations...The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial opportunities in employment for handicapped individuals. 119 Cong. Rec. S. 5882 (1973).

Senator Robert Taft, Jr. also emphasized the need for strong antidiscrimination provisions:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go....Too many handicapped Americans are not served at all,

> too many lack jobs, and too many are underemployed--utilized in capacities well below the levels of their training, education and ability. However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all--discrimination. 119 Cong. Rec.

The Senate report which accompanied the final bill also reflected the broad remedial intent of Section 504. (S. Rep. No. 31, 9, 93rd Cong., 1st Sess. 6 (1973)).

> "The committee strongly believes that all planning of buildings, public and private, transportation systems, communications systems and all public programs and services must make provision for the needs of handicapped individuals."

As expressed by Senator Jennings Randolph, "These (provisions) will help expand the vistas of opportunity for handicapped individuals across our land." 119 Cong. Rec. 24587 (1973).

The legislative history of the 1974 Amendments to the Rehabilitation Act further demonstrate Congressional intent to create a broad government policy prohibiting discrimination on the basis of handicap. As stated in the Senate Report:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (Title VI) (related to race, color or national origin), and Section 901 of the Education Amendments of the 1972, 42 U.S.C. 1683 (related to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. S. Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* (1974) U.S. Code Cong. & Ad. News 6373, 6390.

Senate Report No. 1139, 93rd Cong., 2d Sess. (1974) described Section 504 as covering a wide range of recipients:

> Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services, in relation to federal assistance in employment, housing, transportation, education, health services or any other federally aided programs. Examples...are as follows: physically or mentally handicapped individuals who may be denied admissions to federally supported *school systems* on the basis of their handicap; handicapped persons who may be denied admission to federally assisted *nursing homes* on the basis of their handicap; those persons whose handicap is so severe that employment is not feasible but who may be denied the benefits of a wide range of federal programs; and those persons whose vocational rehabilitation is complete but who may nevertheless be discriminated against in Federally assisted activities.

Nor did Congress draw any distinction in the coverage of Section 504 that would look to the discretion of recipients of federal funds. Congress did not wish to give federal financial assistance to any recipient that discriminated on the basis of race, sex or handicap.

> The language of Section 504, in following the above-cited Acts further envision the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of *recipients* of federal financial assistance, attempts to bring noncomplying *recipients* into voluntary compliance through informal efforts such as negotiations, and the imposition of sanctions against *recipients* who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of federal financial assistance to the recipient or other means otherwise authorized by law. *Implementation of Section 504 would also include pregrant analysis of recipients to ensure that federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pregrant review procedures and a requirement for assurances of compliance with Section 504. Id.*

The 1978 Amendments to Section 504 (Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978) added §(a)(2) which provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of federal assistance or federal provider of such...[2]

Section 505(a)(2) was intended to give approval of and codify the 1977 HEW regulations. See Consolidated Rail Corporation v. LeStrange, 104 S. Ct. 1248 (1984). In addition to the substantive regulations under §504, HEW also had incorporated the administrative enforcement procedures under Title VI. 45 CFR Sections 80.6-80.10 and Part 81. The Senate Report states this intent:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies and rights under Section under 504 conform with those promulgated under Title VI. Thus, (Section 505) codifies existing practice as specific statutory requirement. S. Rep. No. 890, a supra at 19, reprinted in (1971) U.S. Code Cong. & Ad News at 7312.

A review of the title VI enforcement regulations make it clear that the existing administrative practice of HEW was to investigate claims of discrimination against recipients of federal funds.

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[2] The 1978 amendments also did the following: (1) broaden and strengthen the powers of the Architectural and Transportation Barriers Compliance Board; (2) expanded the coverage of Section 504 to include federal agencies and departments; (3) allowed reasonable attorney's fees to the prevailing party in actions brought under Title V; (4) clarified the term, "handicapped individual," as it pertains to the employment of drug addicts and alcoholics; and (5) made available remedies of Title VII for violations of Section 501.

45 CFR 80.7 Conduct of Investigations

(a) Periodic compliance reviews. The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) Complaints. Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may be himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

Investigations. The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent policies and practices of the recipient, the circumstances under which the possible noncompliance with this part occurred and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

Resolution of matters. (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in §80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Section 601 of the Act or this part, or because he has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.
(Sec. 601, 602 Civil Rights Act of 1964; 73 Stat. 262; 42 U.S.C. 2000d, 2000d-1) (29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17981, 17982, July 5, 1973).

The Title VI procedural regulations use the term program only when referring to the termination of federal funds. 45 CFR 80.8(c) provides:

> Termination or refusal to grant or continue federal financial assistance. No order suspending, terminating or refusing to grant or continue federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record after opportunity for hearing of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue federal financial assistance shall be limited to the particular political entity, or part thereof, in which such noncompliance has been so found.

Hence, Section 505(a)(2) simply codifies an earlier intention, expressed by Congress in 1974 and implemented in 1977 by HEW to provide the same procedures for enforcement of Section 504 as had been established for Title VI. The Senate Committee recognized that the 1977 HEW Section 504 procedural regulations, accomplished the goal of insuring "administrative due process and administrative consistency within the federal government. Sen. Rep. No. 890 *supra* at 19.

The above interpretation of Section 505 is wholly consistent with the overall intent of the other 1978 Amendments which was to expand the rehabilitation program, increase employment opportunities and reaffirm equal opportunity guarantees. In fact, the declaration of purpose was amended in 1978 to make the "guarantee of equal opportunity" an explicit purpose of the Act. 29 U.S.C. (Supp. III) 701; See H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 37 (1978).

The broad ban on disability-based discrimination by recipients of federal funds was also evident in the debates in 1978 concerning the extention of Section 504 coverage to the federal government and its agencies. As originally enacted, Section 504 was not explicit as to its coverage of the federal agencies. The 1978 amendments added executive agencies and the United States Postal Service to the coverage of Section 504. As noted by Congressman Jim Jeffords:

> This amendment removes (the exemption for the federal government) and applies 504 to the federal government as well as State and local recipients of federal dollars...I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination. 124 Cong. Rec. H13901 (1978).

In debate on a proposal by Senator James McClure to limit a court, in an action against the federal government, to the provision of equitable and affirmative action remedies that would be proportionate to actual damages, the recipient as a whole was again viewed as the entity responsible for ensuring equal opportunity. 124 Cong. Rec. 30576. Senator Alan Cranston, a sponsor of the 1978 Amendment, vehemently opposed the proposed amendment arguing that the federal government should be required to do at least that which private employers are required to do. Id. at 30577-78. He stated that:

> The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the federal government and the obligations of federal contractors and _grantees_. Ironically, the senator's amendment would limit with a financial test the federal government's obligation of being an equal opportunity employer. Federal contractors and _grantees_ would--appropriately--continue to be required to equal opportunity employers. _Id_.

In conclusion, the legislative history demonstrates Congress' intent to ban all discriminatory practices and policies in all programs or activities operated by recipients of federal financial assistance. Any remaining doubt is dispelled by a review of the HEW §504 regulations which were explicitly approved by Congress in the 1978 amendments.

THE ADMINISTRATIVE REGULATIONS UNDER SECTION 504 PROHIBIT DISCRIMINATION BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

In April, 1976 President Gerald Ford issued Executive Order 11914 instructing the Department of Health, Education and Welfare to implement Section 504 and coordinate Section 504 implementation by all other federal departments and agencies which extend federal financial assistance. HEW issued its 504 implementing regulations on May 4, 1977 (45 CFR Part 84)[3]. Throughout this period, HEW evaluated over 850 public comments and the testimony from 32 public hearings. As the Supreme Court recognized in Consolidated Rail Corporation v. Darrone, supra "the responsible congressional committees participated in their (the regulations) formulation and both those committees and Congress itself endorsed the regulations in their final form." The HEW regulations have served as the model for all other agency regulations and follow the same framework.

The entire framework of the regulations revolves around the underlying position that all recipients of federal financial assistance from any source must assure nondiscrimination, access and equal opportunity in all of their programs, activities and operations. This is clear in the overview by HEW Secretary Joseph Califano which was published with the final regulations (42 Fed. Reg. 22676, 22677 (May 4, 1977). This overview is set forth below:

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[3] When HEW was split into the Departments of Education and Health and Human Services the regulations were recodified but unchanged. The Department of Education 504 regulations now appear at 34 CFR Part 104.

OVERVIEW OF REGULATION

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employees and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addiction and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation--program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing building need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other menas of assuring program accessibility is available.

Subparts A, B, and C of the regulations as well as subpart G--which incorporates by reference the Department's procedures under Title VI of the Civil Rights Act of 1964--apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary and secondary education. Its provisions have been closely coordinated with those of Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education for each qualified handicapped child in the most normal setting

> appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that the school system provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.
>
> Subpart E deals with post secondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.
>
> Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

The regulations place the responsibility on the recipient of federal funds to assure nondiscrimination through adherence to the substantive provisions set forth in the regulations. Recipient is defined as:

34 CFR §104.2(f) provides:

> Recipient" means any state or its political subdivision, any instrumentality of state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

The regulations explicitly cover the recipient as a whole, including its component parts. Hence, for example, §104.31 states that

> Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

In fact the regulations are rendered meaningless and unworkable after the Grove City decision.

Following the above example, the regulations require a recipient to educate "each qualified handicapped person in its jurisdiction" with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person (§104.34(a)). If the Grove City decision is interpreted to divide a school system into discrete and separate "programs" with some covered and others free to discriminate, the mainstreaming requirement of the regulations could be avoided. The child could be protected by §504 while participating in the special education program but be subject to discrimination, including exclusion from regular education programs if the regular classes did not directly receive federal funds. The special education "program" would not even have the authority to assure the child's participation in regular education classes, while the recipient clearly does. The regulations further require that "a recipient shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities." Nonacademic and extracurricular activities are defined to include

> counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, . including both employment by the recipient and assistance in making available outside employment. §104.37(2)

Obviously this provision, so critical to full integration of disabled children in schools would be rendered meaningless if each separate activity would have to directly receive federal financial assistance to be covered by §504.

Likewise the regulations view post-secondary education recipients as a whole and as a sum of their component parts. §104.41 provides:

> Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities that receive or benefit from federal financial assistance for the operation of such programs or activities.

Again, the regulations would be wholly ineffective if each "program" of a university was viewed separately with antidiscrimination coverage dependent on whether it directly received federal funds. For example, the regulations provide that "a recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others." 34CFR 104.45(a). This provision would be useless after Grove City if the university demonstrated that no federal funds were used directly in its housing program. Even more fundamentally, students applying for admission in or enrolling in colleges which directly receive federal funds would be protected by §504 while those in colleges not directly funded would not, even though both colleges are part of a university which receives substantial federal assistance. A student pursuing a career in secondary education with a major in political science could be admitted to the School of Education because it receives federal funds but be precluded from taking courses in political science, because college does not receive federal funds. The regulations forbid this result.

34 CFR 104.43(c) states that:

> A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

The official HEW analysis of the regulations states why this section was deemed necessary.

> Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its educational program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job in the area in question for a person with that handicap. 42 FR 22692 (May 4, 1977).

Hence, the hypotheticals referred to above are not merely imaginary.

The damaging results of Grove City's narrow program or activity restriction is particularly evident in the area of employment. Once again the regulations put the responsibility of equal employment opportunity and reasonable accommodation on the recipient of federal funds. In determining whether an accommodation is reasonable the regulations set forth factors to be considered, such as the "overall size of the recipients program with respect to the number of employees, number and type of facilities and size of budget" and the "type of the recipient's work force." (34 CFR 104.12(c)). The word program is clearly used in this context to refer to the recipient's overall operations.

The Supreme Court has recently resolved a five-year controversy among the Federal Circuit Courts on Section 504's employment coverage. Relying on the incorporation into §504 of the rights, remedies and procedures under Title VI in the 1978 amendments, several Circuits[4] held that the limitation contained in Title VI (§602) for employment coverage to only those instances where a primary purpose of the federal funds is to provide employment applied to Section 504 as well.

In a unanimous decision in Consolidated Rail Corp. v. Darrone, supra, the Supreme Court held that Section 504 covered employment regardless of the purpose of the federal funds. The court stated that HEW, "from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial assistance, regardless of the primary objective of the aid." And as noted earlier, the Supreme Court stated that these regulations "particularly merit deference because Congress "participated in their formulation," and "endorsed the regulations in their final form."

The Darrone decision, of course, represented an important victory in disability civil rights law under §504. The irony is that the Grove City decision issued the same day threatens to substantially curtail the effect of this victory. After Grove City, a disabled person's right to equal employment opportunity would be uneven at best. For example, a disabled professor could apply for employment in the English department of Grove City College and be flatly refused on the basis of disability. Equal employment opportunity would only be guaranteed in the student financial aid office. Likewise, a disabled person's right to be free of discrimination could turn on the particular program of the university for which employment is sought. All disabled law professors could be banned so long as the law school is not in direct receipt of federal funds. The very purpose of the 1973 Rehabilitation Act was to "promote and expand employment opportunities for handicapped individuals..." 87 Stat. 357, 29 U.S.C. §701(8). The legislative history is replete with statements stressing the importance of equal employment opportunity to the ultimate goal of the 1973 Rehabilitation Act--the integration of disabled citizens into the American mainstream.[5] The narrow interpretation of program or activity is inconsistent with the intent of Congress recognized in Darrone to broadly prohibit employment discrimination by recipients of federal funds.

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[4] United States v. Cabrini Medical Center, 689 F2d 908 (2dCir. 1981); Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); Scanlon v. Atascadero State Hospital, 677 F.2d 1271 (9th Cir. 1982). Contra; LeStrange v. Consolidated Rail Corp. 687 F.2d 767 (3d. Cir. 1982), affirmed 104 S. Ct. 1248 (1984); Jones v. MARTA, 681 F.2d 1376 (11th Cir. 1982)

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[5] Such problems as unfounded discrimination in employment and***difficulties of access to places of work***were voiced repeatedly in committee.***(D)iscrimination in placement, hiring and advancement continues(s) to limit the vocational rehabilitation program's ability to effect successful rehabilitations. (119) Cong. Rec. 5882 (1973) (Cranston). Too many handicapped Americans***lack jobs, and too many are underemployed***.

(I)f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all--discrimination. 119 Cong. Rec. 24587 (1973)(Taft)

The negative and illogical affect of the Grove City decision on §504's employment coverage is well illustrated in a case currently pending before the Department of Education. The Department of Education, after investigation found that Lauderdale County, Alabama school district refused to rehire a handicapped teacher who has lupus solely on the basis of her handicap." The Lauderdale school district filed a response arguing that the Grove City decision strips OCR of any jurisdiction because the teacher taught math and physical education and neither of these "programs" received federal funds. 17 Education Daily, p.4 (April 11, 1984).

The examples demonstrating the probable negative effects of the Supreme Court's narrow "program or activity" holding in Grove City are endless. The Section 504 regulations after much deliberation and explicit approval by Congress require recipients to assure nondiscrimination in all of their operations. Any other formulation of the antidiscrimination mandate would be unworkable and ineffective and would render the promise of equal citizenship for disabled Americans hollow indeed.

The Civil Rights Act of 1984 is Necessary to Reaffirm Congressional Intent that Section 504 Assure Equal Opportunity by Prohibiting Discrimination by All Recipients of Federal Financial Assistance

Section 504, more than any other piece of legislation, is looked upon by disabled Americans as the hallmark of this nation's commitment to integration and equal opportunity. Congress extended a promise of nondiscrimination, as yet unfulfilled. However, in the ten short years since its enactment §504 has opened doors which the Grove City decision threatens to close once more. The benefits of nondiscrimination are realized not only by disabled citizens, the direct beneficiaries of §504, but also by the society as a whole. Equal opportunity is not only a moral and legal imperative; it is a good investment in the future.

For example, the Supreme Court recently recognized in Consolidated Rail Corporation v. Darrone, supra, that Congress was acutely aware that a strong national policy of antidiscrimination was necessary to open employment opportunities to disabled Americans. Disabled people face staggering unemployment rates. Unemployment has currently been estimated to be between 50 and 75% by the President's Committee on Employment of the Handicapped.[6] Furthermore, studies indicate that only in a tiny percentage of cases is inability to perform a regular, full-time job the reason a disabled person is not employed.[7]

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[6] Handicapped Rights and Regulations, Vol. 4, No. 7 (April 5, 1983), p. 49

[7] See, eg. Berkeley Planning Associates, Final Report: Analysis of Policies of Private Employers Toward the Disabled (prepared under HHS contract) (Nov. 1981), p. 413

A comparison between the studies on employer's attitudes and the studies on the actual performance of disabled workers demonstrates a large discrepancy between the perceived incapcity and the actual incapacity of disabled applicants and workers.[8]

The cost of employment discrimination is tremendous to disabled individuals and to society at large. In a major study commissioned by the Office of Civil Rights, HEW, it was estimated that eliminating discrimination against handicapped people in HEW-funded grant programs would yield $1 billion annually in increased employment and earnings for disabled people.[9]

In addition to increasing the gross national product, it has been estimated that such an earnings increase by handicapped workers would result in some $58 million in additional tax revenues to Federal, State and local governments.[10]

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[8] See Brief of Amici Curae American Council for the Blind and Sixty Two Other National, State and Local Organizations Dedicated to Promoting the Civil Rights of Disabled Persons in Consolidated Rail Corporation v. LeStrange (Darrone), in the Supreme Court of the U.S., Oct. Term, 1982.

[9] Discrimination Against Handicapped Persons: The Costs, Benefits and Inflationary Impact of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance, 41 Fed. Reg. 20, 232 (1976). See, Note, "Mending the Rehabilitation Act of 1973," p. 727.

[10] S. Rep. No. 318, 93d Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad. News 2076, 2086; 119 Cong. Rec. 24,586 (1973) (Statement of Sen. Cranston). These 1973 estimates were based upon a minimum 5 percent of income tax rate. By 1978 the estimated rate had already risen to 6 percent. See H.R. Rep. No. 1149, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 7320.

Similarly, studies indicate that equal educational opportunities yield substantial economic benefits by reducing the need for institutionalization, increasing future earnings, and decreasing the need for public assistance. For example, in 1976 HEW estimated that expansion of special education services pursuant to the requirements of Section 504 of the Rehabilitation Act would result in an annual increase of $1.5 billion in adulthood earnings of the additional handicapped children served.[11] The results of equal access to higher education is similar. One study estimated the rate of return on investments in higher education for disabled students to be between 14 and 17 percent, about the same or a little higher than the return for nondisabled students.[12] However, the estimated rate of return for society was shown to be 31 and 40%, more than twice the social return on investment in the education of nondisabled.[13] The reason for the discrepancy is that a college education not only widens job opportunities but also often marks the difference between a life of unemployment and dependency and one of economic and social independence.[14]

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[11] Discrimination Against Handicapped Persons: The Cost, Benefits and Inflationary Impacts of Implementing Section 504 of the Rehabilitation Act of 1973 Covering Recipients of HEW Financial Assistance, 41 FR 20365 (1976).
See also Ronald Conley, The Economics of Mental Retardation (Baltimore: John Hopkins Univ. Press, 1973), pp. 296-300; L.J. Schweinhart and D.P. Weikart, "Young Children Grow Up: The Effects of the Perry Preschool Program on Youth Through Age 15" (Ypsilanti, Minn.: High Scope Educational Research Foundation, 1980). See also Discrimination Against Handicapped Persons Cost Study, 41 FR 20312, 20338-60 (1976)

[12] Charles H. Blake, Michael J. Cleary, Louis Quatrano. The Psychological and Economic Impact of Wright State University's Handicalpped Student Services Program, Wright State University, Dayton, Ohio 1977

A thorough review of the benefits of nondiscrimination in all areas covered by Section 504 is presented in a recent publication of the United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Clearinghouse Publication 81, September 1983.

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[13] Id. pp. 58-59

[14] For a review of the relatively insignificant costs in accommodating disabled student in higher education see, Daniel Finnegan, Disabling the Disabled: Discrimination in Higher Education, Lawrence Hall of Science, University of California at Berkeley, pp. 13-14.

Congress' well documented intention in 1973 to extend the guarantee of equal opportunity to disabled Americans by assuring that federal funds do not contribute to or promote discrimination would be drastically curtailed by the Grove City decision. If an agency provides funds to an institution it should have the right to investigate any claims of discrimination. The appropriate remedy, should discrimination be found and conciliation efforts fail is a different matter. The agencies power to terminate or discontinue assistance is tailored to the particular circumstances involved in an individual case. If termination of federal funds is not an appropriate remedy because the assistance does not support the discrimination, the agency may resort to "other means authorized by law," such as referral to the Attorney General to bring a suit to address the actual discrimination involved in the case. In addition, the claimant could pursue his/her discrimination claim through a private right of action in court. Most often in the case of §504, agency intervention results in needed technical assistance on the most efficient means of complying with the law and results in voluntary compliance. Termination has never been ordered by any administrative agency but it continues to provide a vital role in maintaining the strength of Section 504 enforcement.

Once again, disabled Americans look to Congress to reaffirm the basic principles of integration and equal opportunity through a clear and straightforward clarification of its original intent. We are confident that this nation's commitment to disabled citizens which was firmly established in 1973 will not be abandoned.

Ms. Wright. As a result of my disability, I have a degenerative muscle disease in my eyes. I have brought along my colleague to act as my reader today, and I would like to introduce Bonnie Milstein, who will read my statement for the record.

Senator Dole. Fine. Again, if you could summarize, it would be helpful.

Ms. Milstein. Thank you, Senator.

I am the director of governmental affairs for the Disability Rights Education and Defense Fund [DREDF].

We have submitted written testimony to the committee and request that it be included in the record.

I am testifying today, as a double minority. First, I am disabled, second, I am a woman. I am a double minority in that order because that is the way society treats me. I will be discriminated against by society first based on my disability, then based upon my sex.

My story is not unique. It is like the thousands of stories I hear each year; the disabled lawyer who graduated No. 1 in his class, who had 32 interviews and received no job. Why? Because lawyers should not be in wheelchairs; or the disabled woman who graduated in the top of her class with an M.A. in social work and the only job she could get was selling light bulbs by phone; or the woman who had to sue the State to get her teaching certificate even though she had completed all the appropriate requirements. Why? Because the State thought she would be a fire hazard as a teacher in the same elementary school where she had graduated as a pupil in a wheelchair, 10 years before; or the disabled man who could not get a job working in city or county government because he refused to wear his artificial leg; or the disabled girl who wanted to be a trainer on the girls' hockey team but was denied that opportunity, because she was disabled; or the parents who had to sign a release in order to place their child in public school because the school believed that a wheelchair would damage the school property; or the disabled man who was denied custody of his nondisabled children because, according to the judge, he could never teach his sons to play baseball like fathers should.

Congress took a bold step in 1973 when it passed section 504. For the first time Congress recognized that disabled people, like minorities and women, were subject to discrimination and were entitled to basic civil rights protections. I am here today because we believe that the Supreme Court's decision in *Grove City College* hopelessly obstructs this path. In 1971, prior to the enactment of section 504 and its regulations, students at Weber State, UT were forced to make academic selections on the basis of which classrooms were accessible. Before section 504 there were 12 disabled students at Weber State College, Now, in 1984, there are over 175 disabled students.

In 1975, before section 504, there were 30 disabled students at Ohio State University. In 1984 there are 662.

All across the country in small and large institutions, enormous progress is being reported and in each case the existence of section 504 is given as the primary reason for the progress. To the best of my knowledge, no small, independent, State, land grant or private university has closed as a result of complying with section 504.

But instead, as a result of the so-called Federal intrusion some members of this administration complain about, there is more than a 300-percent increase in the number of disabled graduates of higher education; more than a 300-percent increase in disabled Americans ready to work; ready to participate in society; ready to pay taxes.

Education, however, is not enough. The cost of employment discrimination is tremendous both to disabled individuals and to society at large. In a major study commissioned by HEW in 1976, it was estimated that eliminating discrimination against disabled people in HEW-funded grant programs would yield $1 billion annually through increased employment and earning for disabled people.

In addition to increasing the gross national product, it has been estimated that such an earnings-increase by handicapped workers would result in some $58 million in additional tax revenues to Federal, State, and local govenments. Studies also indicate that equal educational opportunities yield substantial economic benefits by reducing the need for institutionalization, increasing future earnings, and decreasing the need for public assistance. For example, in 1976, HEW estimated that expansion of special education services pursuant to the requirements of section 504 would result in an annual increase of $1.5 billion in adult earnings of the additional handicapped children served.

The results of equal access to higher education is similar. One study estimated the rate of return of investments in higher education for disabled students, to be between 14 and 17 percent, about the same for nondisabled students. However, the estimated rate of return for society was shown to be between 31 and 40 percent, more than twice the economic return on investment in the education of nondisabled. The reason for the discrepancy is that a college education not only widens job opportunities but, for the disabled student, it marks the difference between a life of unemployment and dependency and one of economic and social independence.

Recently, some have been calling access to education, employment, social services, and health, "federal intrusion." We call it economic commonsense.

Once again, disabled Americans look to Congress to reaffirm the basic principles of integration and equal opportunity through S. 2568. This Bill does nothing more than return section 504, the disability civil rights statute, to where it was prior to the *Grove City* decision. Before *Grove City,* this civil rights statute was successfully used to resolve all the stories of denied opportunity that I listed in the beginning of this testimony.

I rarely find myself quoting the President, but today I am reminded of a speech he gave on November 28, 1983, while proclaiming the National Decade of Disabled Persons. He said, "We believe equal opportunity, equal access and greater economic independence must be more than slogans * * *."

The question before you and the other Members of Congress today is serious and should not be taken lightly. Discrimination is a serious problem. Those who choose to discriminate are much more sophisticated than those who discriminated 20 years ago, when the Civil Rights Acts were first passed. There are no signs that state "wheelchairs are not allowed here." But discrimination is everywhere, even in the halls of Congress. On the first day of these Senate hearings—May 30, 1984—a disabled staffer, employed for many years on the Hill, was barred from entering the hearing room. Why? Because she was told that she would be a fire hazard.

You have a choice. That choice is to allow discrimination to continue or not. If you choose to allow discrimination to continue you should know that you will appropriate even greater numbers of dollars in the future for welfare, medicaid, and SSI. It is your choice: disabled dependence on the Federal dollar or independence off the Federal dollar, through, what some would call, "intrusive" enforcement of the civil rights statutes.

Thank you for the opportunity to testify.

Senator DOLE. Senator Kennedy alluded to one area and, of course, I understand that some think that anything that is introduced is sacred and should not be touched, but I would hope that the panel would agree that if there are areas that should be clarified—maybe there are not any—but if there are some, they should be clarified.

The position that you cannot change legislation once it is introduced is a novel approach. If it is possible, I would like to try it.

But is that the position of the witnesses that we cannot amend the legislation? Dr. Flemming?

Mr. FLEMMING. Senator Dole, I have been appearing here over a long period of time. I would never take that position. I have listened to the discussion this afternoon on the question of the need for amendments and the need for clarification.

There is not any question in my mind at all but that those who have been working on this legislation have just one objective in mind and that is to get back to where we were prior to *Grove City*.

Any of us could take any of these statutes and go to work on them and come up with suggestions for improvement, but at this particular point, we feel that it is very very important in terms of combating institutional discrimination to get back to where we were prior to *Grove City*.

I have listened to the testimony of my colleagues on this panel before you. I have read very carefully the testimony of Dave Tatel who was the head of the Office of Civil Rights and who is one of our very distinguished lawyers in the field of civil rights.

He analyzed the testimony that the Assistant Attorney General presented over—before the Judiciary Committee of the House of Representatives.

The Assistant Attorney General presented essentially the same testimony before this committee.

Now, I have become accustomed over the years to listening to lawyers on both sides of issues and trying to evaluate their arguments in arriving at a conclusion.

There is not any question in my mind at all that if I were writing a report I know that the testimony that Dave Tatel gave before the Judiciary Committee would be far more helpful to me if I were out to achieve the objective that I have just stated than the testimony of the Assistant Attorney General.

Because I do not see all of the problems that the Assistant Attorney General has identified here by any means. And I think that the statement that has been made here that those who worked on it drew on the experience of the past, the court decision, the regulations that have been issued and so on, and they have done, in my judgment, a workman like job.

I agree with you that undoubtedly there may be some opportunity for refining some of the language in order to achieve that particular objective.

But I recognize the problem that you have stated very effectively, your time problem. And clearly I do not think—that if this legislation gets loaded down with amendments now, it is obvious that time is going to run out and we will not get action at this session of the Congress.

I think that it is very very important to get action in this session of Congress.

Therefore, the suggestion that you made and that others have made that where things need clarification to be done through committee report, through discussion on the floor, appeals to me very very much.

I hope that there will be a preference for going at it that way as contrasted with running the risk of time running out on us because this gets loaded down with amendments.

Senator DOLE. I do not quarrel with that view. It just seems to me that there may be areas for clarification—I am not on the committee that has jurisdiction, I am on this committee.

But it would be my hope, if I can give them any advice—which I will—[Laughter]—that the bill would come out of committee with a unanimous vote, with any differences being worked out between now and next Wednesday.

We can horse around here for 6 months. Somebody raises a question and we try to clarify it. Somebody raises another question and we try to clarify it.

So, I do not think there is any difference of opinion on that. But I think the point is we have got about 45 legislative days this year, if I add them up.

That is probably assuming too much if we work all week like everyone else. [Laughter.]

I think it is fair to say with Senator Baker's massive pile of legislation out there, including appropriations bills, debt reduction, a lot of other things, if it takes over a day, he is probably not going to bring it up.

So, we are in a position right now where someone could block this legislation for no really good reason. I do not know of anyone who wants to do that, but they could.

So, I am just trying to find some way to make certain we pass the bill and Mr. Reynolds indicated he was positive about the legislation. I take him at his word.

So, I hope we are all going to be working together. I know some very able people put this legislation together and I think they did it with the intent of doing just what everybody indicates the intent should be.

That does not mean that somebody cannot come along and find some little area that needs to be clarified. I do not quarrel with the legislation. I am a cosponsor, but I did not read it before I cosponsored it and I doubt if many of the 63 did. I am not even certain if the principals did.

That is not a requirement. We do not have to read things around here. [Laughter.]

I do not have any other questions. We are going to be working with all of you.

Ms. LICHTMAN. May I add one thing if I promise to be very brief.

Senator DOLE. Right.

Ms. LICHTMAN. The one amendment that was suggested here today was one suggested by Senator Hatch before you came. It is not an amendment for purposes of clarification. It was an amendment that would provide for an exemption in title IX for small religious institutions. He did not exactly spell it out.

But that is just the kind of amendment that makes somebody like me worry a lot. That is not a clarifying amendment. It is not a helpful amendment. It is an amendment that causes lots of problems for women at those institutions no matter how few there are that might be covered by Mr. Hatch's amendment.

Secretary Bell suggested that there may be as few as 40 or 50 such institutions.

Even 40 or 50 educational institutions in this country should not be permitted legally to say to the girls and young women who are attending those institutions that you have no laws to cover you, you have no equal rights amendment, as Senator Hatch well knows, and you no longer have title IX coverage.

That is not a helpful amendment meant in the spirit of clarifying and easing the passage—the quick passage of this legislation.

Senator DOLE. But I think that points up a problem. If somebody insists that that is an amendment that should be adopted, you have a problem.

I do not suggest that there are a lot of people who start leveraging amendments when we run out of legislative days.

That gives some people a lot of leverage. They can say, "Well, if you do not want the bill to pass, then do not take my amendment."

Mr. FLEMMING. Senator Dole, I would agree. That would not be a clarifying amendment. That would open up a whole new rather fundamental issue as far as I am concerned.

Senator DOLE. I was not here when that was discussed, but it would appear that that may be the case. Well, Althea, do you have anything else?

Ms. SIMMONS. No. I could rephrase what they just said, but I concur. [Laughter.]

Senator DOLE. Without amendment. Right? [Laughter.]

Ms. SIMMONS. I concur that we have no objection to anything to clarify, no problem. But to open up new avenues, that would be a problem.

Senator DOLE. Pat?

Ms. WRIGHT. I would just like to clarify something Mr. Reynolds said, which was implied in his statement or said directly that said that the way this bill was drafted it would force pharmacies to be covered.

If his bevy of attorneys would go back to the regulation published in 1977 by the Department of HEW, they would all find out that pharmacies have been covered since 1977. So, it is not an expansion to cover pharmacies. They have been and there has been no problem with it.

Senator **Dole**. I guess I was not here when that was raised, but at least you have responded to it.

We appreciate very much your coming. I know Senator Hatch does. Let me call the next witness while Senator Hatch is returning. Thank you very much.

STATEMENT OF ROBERT DESTRO, CATHOLIC UNIVERSITY LAW SCHOOL

Mr. **Destro**. Senator Dole, my name is Robert Destro. I am here in a personal capacity, not in my capacity as a member of the Civil Rights Commission.

I asked for the opportunity to testify today, and I have to apologize to the committee for not having a statement prepared. I only found that this issue was going to come up today on Thursday and I had another commitment on Friday and Saturday for the Commission.

With your indulgence, I will submit my written comments for the record afterwards.

Senator **Dole**. Without objection, your written comments will be inserted into the record.

Mr. **Destro**. The reason I come here today is to address the issue that was just raised at the end of the last panel. My area of teaching expertise in Constitutional law is church/state relations and first amendment law.

I am concerned about two aspects of the amendments here. Both of them deal with first amendment concerns. The first is title VI itself, and the second are the title IX regulations dealing with religious institutions.

Now, I understand the argument that all that is intended in this bill is to reverse the *Grove City* case. However, as a practical matter—as one who is in support of this bill and took that position at the Civil Rights Commission meeting where we discussed the concept of reversing *Grove City*—it occurs to me that this bill is, in truth, an "opening up" of the major cross-cutting civil rights statutes.

What I would like to suggest for purposes of title VI is that we do much the same thing with title VI as was done with sex discrimination under title VII when it was originally proposed: simply add "religious discrimination" as one of the prohibited forms of discrimination under title VI.

It is a fairly simple change. And if one takes a look at all the titles of the 1964 Civil Rights Act, only titles I and VIII which dealt with voting, do not include it for reasons related to the statute. Obviously religious discrimination does not come up much in the area of voting.

Titles II, III, IV, V, and VII all include religious discrimination, but title VI did not. And I have always wondered why it did not.

The legislative history of title VI, from all I have been able to find out, is silent on the issue of why religious discrimination was not included.

It seems to me that as long as the Congress is reaching out with its funding powers to prohibit discrimination against all Americans it should reach out to protect believers as well. Certainly, if you look at all of the amendments which are proposed here, we've got every single category of illegal discrimination being included except for religious discrimination. Why the ommission?

There are a number of different examples that I can give that would be covered, one of which is the Nebraska case that was famous in the last few months where there is still at least one minister in jail because of his beliefs. There is no question that the Nebraska Department of Education, as well as the Nebraska court system, received Federal funds in order to function, and there is no doubt in my mind that a civil rights violation has occurred. There was absolutely no concern, in my judgment, that the religious concerns of these individuals be taken into account, and there was no forum, State or Federal, which recognized a Federal claim.

The other issue which I will address very briefly is the title IX regulation governing religious institutions. I did a little telephone calling in preparation for this testimony and found great concern on the part of religious institutions. Again I will supplement this testimony in writing.

You indicated—it was either you or one of the witnesses—there were just a small number of institutions which were covered by title 14.

As a matter of fact, since 1975, over 200 institutions have applied for exemptions under the religious exemption of the title IX regulations. Not one of those exemption requests has been acted on, in part because the Department of Education really does not know what to do with them.

There are no standards on which to judge an application, and the case law is very erratic in dealing with religious exemption rights. My suggestion, which I will make in writing, is that the language of the statute, section A(3), be amended to clarify the exemption, in much the same manner as the title VII regulations do. The exemption would then cover institutions which are "owned, supported, controlled or managed by a particular religion or a particular religious corporation, association or society, or if the curriculum of the school, college, university or other institution of higher learning is directed toward the propagation of a particular religion." This language gets into the heart of the issue of accommodation of bona fide religious beliefs.

I can tell you from my perspective as a Commissioner that the Commission is only now beginning now to take a look at the question of interface of various constitutional and civil rights. In this bill, you have sex discrimination being outlawed. How does that relate to the issues of the first amendment rights of religious organizations? It is an important issue.

I think that is something important—it is not a "different" issue. It is really something that all of us have to be concerned about—an issue that has to be dealt with now, in part because in most of our lifetimes I do not think we are going to see the major cross-cutting civil rights statutes opened up again like they have been here, and there are civil rights involved here which may lose protection if no action is taken.

With that, I will end. If you have any questions, fine.

Senator **Dole**. Senator Hatch may have questions. I do not have any. I understand that Senator Hatch does not have any questions. You may be excused.

Mr. **Destro**. Thank you.

[The prepared statement of Robert A. Destro follows:]

PREPARED STATEMENT OF ROBERT A. DESTRO

Mr. Chairman, I appreciate the opportunity given me by the Committee to submit additional written comments for the record. At the outset, I should make clear that my written comments are made in my capacity as a Professor of Constitutional Law and Church/State Relations*, and not as a representative of the United States Commission on Civil Rights.

The purpose of this testimony is two-fold: first, to raise first amendment concerns respecting S.2568; and, second, to discuss the broader topic of religious discrimination and its coverage under the Civil Rights Acts. As a professor of constitutional law, and as an individual Civil Rights Commissioner, my overriding concern is that constitutional rights to religious freedom not be ignored in the rush to overturn the Supreme Court's decision in Grove City v. Bell, - U.S. - , 52 U.S.L.W. 4283 (February 28, 1984). I can--and do--appreciate the concern of those who argue strenuously that no amendments should be permitted to the statute. But the concerns that I raise in this testimony are real, and are designed to insure that fundamental constitutional rights are protected. As a result, testimony addressing the need to expand the religious exemption of Title IX to reflect the diversity of sincere religious endeavor does not, as a previous witness suggested, seek to "excuse discrimination". Rather, it highlights the fact that reasonable minds may differ as to the nature and extent of permissible government regulation of religious organizations or activity. Similarly, to suggest that an amendment to S.2568 be added to provide that discrimination on the basis of religion is forbidden by Title VI of the Civil Rights Act of 1964 is not an attempt to raise "side" issues: it goes to the heart of the civil rights concerns of the bill itself. As the following testimony will point out, there is little constitutional or conceptual support for refusing to provide a meaningful religious exemption or for not prohibiting religious discrimination in federally funded programs. The rights protected by the Religion Clauses of the first amendment are those which government has no right to ask a person, individual or institution to forego, except for the most compelling reasons. In fact, reference to James Madison's Memorial and Remonstrance in defense of religious liberty--one of the cornerstones of contemporary constitutional jurisprudence of the first amendment--makes it clear that the primary purpose of the guarantee of religious freedom embodied in the Virginia Declaration of Rights was to protect the rights of religious dissenters:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is predecent both in order of time and degree of obligation, to the claims of Civil Society.

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> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may tresspass on the rights of the minority. J. Madison, "Memorial and Remonstrance" against religious assessments (1785) at ¶ 1 (emphasis added)

Because S.2568 and H.R. 5490 represent the first "opening" of the major cross-cutting civil rights statutes we have seen in many years, they are the first opportunity which has existed in as many years to correct obvious inequities and shortcomings in the government's protection of the free exercise of religion. That these bills represent an "opening" of the civil rights statutes is common knowledge, notwithstanding protestations to the contrary that all they do is "reverse Grove City". In fact, it is the "opening" of these statutes which explains the opposition to amendments; for advocates fear that, once open, attempts will be made to "dilute" or otherwise restrict their own understanding of the coverage of the civil rights laws. While understandable, these concerns should not be controlling to the point where the intent of Congress is so unclear as to the coverage of this statute that the Courts are, once again, in the dark as to what the Congress really intended. S.2568's definition of "recipient", and its notable failure to define so critical a term as "support", makes it clear that the intent of S.2568 is to expand the law beyond that which would be required if the intent were only to reverse the Grove City case. With that intent in mind, I shall proceed to explain why the bill is incomplete without due concern for religious freedom.

Suggested Amendments to Title VI of the Civil Rights Act of 1984 To Prohibit Religious Discrimination in Federally Supported Programs.

My first suggestion is that the term "religion" be added to the types of discrimination prohibited by Title VI of the Civil Rights Act of 1964, as amended. As pointed out previously, such a change would reflect fundamental constitutional policy which prohibits both the federal government and the states from discriminating on the basis of religion. An amendment to Title VI would simply extend the prohibition to those individuals or institutions which might be tempted to use federal funds in a discriminatory manner.

Perhaps the easiest and most forthright argument in support of adding religion to Title VI is that there is no reason to exclude it! If one examines Titles I through VIII of the Civil Rights Act of 1964, as amended, one finds that Titles II, III, IV, V and VII all include express prohibitions on religious discrimination. A prohibition against religious discrimination in Titles I and VIII was not necessary, as voting is not an area historically linked in this country to discrimination on the basis of religion. Of the Titles which cover areas in which cases of religious discrimination are reported, only Title VI excludes discrimination on the basis of religion. This exclusion is a serious gap in our civil rights laws. A review of the legislative history does not disclose that there were any reasons for leaving religion out of Title VI and I can think of none. Taken as a whole, the major cross-cutting civil rights laws under consideration in S.2568--Titles VI and IX, Section 504 of the Rehabilitation Act and the Age Discrimination Act--provide for broad prohibitions against all forms of discrimination in federally funded programs except one: religious discrimination. Ironically, it is the only form of discrimination, other than race, which is expressly forbidden by the Constitution itself. This omission should be corrected.

Present Protection of Religious Believers and Institutions in Title VII Should Be Expanded and Included in Titles VI and IX

There are two forms of religious discrimination: 1) discrimination on the basis of religious affiliation or creed (e.g., representation, hiring, firing, and promotion, etc.), and 2) failure to accomodate religious beliefs and practices. Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e et. seq., for example, affirmatively prohibits religious discrimination, and contains exemptions which accommodate the special place of religious freedom for individuals and organizations in our constitutional framework. The bona fide occupational qualification defense (BOFQ), 42 U.S.C §2000e-2(e), for example, takes into account the right of a religious organization to hire individuals who share its religious beliefs. Assuming that religious organizations will be covered by the definition of "recipient" under S.2568, a "tenets" exemption for religious organizations derived from the "tenets" test of Title IX, 20 USC § 1681(a)(3) and the definition of "organization" contained in Title VII, 42 U.S.C. § 2000e-2(e), would be appropriate to Title VI.

In sum, I would suggest that Title VI of the Civil Rights Act of 1964 should be amended as follows:

(1) Section 601 of the Civil Rights Act of 1964 is amended by inserting "religion", after the word "color".

(2) Title VI of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new section:

"Sec. 607. It shall not be an unlawful practice under this Title for a recipient which is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion or particular religious corporation or society, or for any recipient which is a school, college, university or other educational institution or institution of learning where the curriculum is directed toward the propogation of a particular religion, to prefer those who profess, share, or subscribe to its faith or the tenets thereof.

The Need for the Amendments

There are numerous examples which can be given for the need to include religious discrimination in Title VI. For purposes of brevity only three will be included here. First, an example given in my oral testimony, is the persecution of religious schools by the State of Nebraska. Churches, ministers, and parents who send their children to church schools have had their property seized. They have been imprisoned without criminal charges or trials, and harrassed by the state Department of Education, which is a recipient of federal funding, and numerous attempts have been made to close down the Christian schools which are the subject of the controversy. The State of Nebraska has been notoriously unwilling to recognize the first amendment and due process rights of the imprisoned pastors and parents, some of whom were held in jail without bail and without benefit of counsel for nearly 90 days. The Nebraska state and federal courts have cavalierly refused even to consider the unquestionably serious religious freedom claims, preferring instead to look at the case as one involving education. There is no question in my mind that this is a classic example of religious intolerance by an education bureaucracy which is being funded in part by federal tax dollars.

Another example is the refusal of a Maryland public school system to allow students enrolled in religously affiliated schools to enroll in special education courses offered to students in the public schools. The reason given is that parents and children who exercise their First Amendment right to choose a religious education give up any right to partake in the public educational system. Although Maryland law provides that "all children of school age shall be admitted free of charge to the public schools", the schools themselves read in an exception: "all children, *except those who have exercised their right to religious freedom*". Although the United States Supreme Court has clearly held that such a view is unconstitutional, see *Thomas v. Review Board of the Indiana Employment Division*, 450 U.S. 707 (1981), and the Maryland public schools receive federal funds, there is no remedy under Title VI and innocent children cannot share in federally funded programs *in* the public schools because of their religion.

The last, and perhaps the most telling, example is the recent case of Steven and Linda Baum of Knoxville, Tennessee, a case which came to my attention as a member of the U.S. Civil Rights Commission. It appears that Mr. Baum charged Arizona State University with discrimination on the basis of religion by making a complaint to the United States Department of Education. The complaint was rejected on June 3, 1983 on the grounds that the office for Civil Rights "[does]not have jurisdicition to investigate religious discrimination complaints." I have attached a copy of the letter dated October 25, 1983 to Mr. Baum from Mr. Harry M. Singleton, Assistant Secretary for Civil Rights which explains the Department's lack of jurisdiction over religious discrimination complaints. In my judgment, this is a gap in the law which should be remedied as quickly as possible: claims of anti-Semitism and other religious bias are too destructive of society to be permitted.

THE RELIGOUS EXEMPTION OF TITLE IX

In my oral testimony before the Committee I suggested that the religious exemption of Title IX contained in Section 901(a)(3), 20 U.S.C. §1681(a)(3) was far too narrow. As currently in force, the exemption applies only to institutions which are "controlled" by religious organizations. In my judgment, a "control" test is far too restrictive. It does not accommodate the constitutional rights of religious organizations which may not be "controlled" by an organized church or religion, but which are clearly religious in nature (*e.g.*, a religious school governed by a lay board).

The difficulty with a "control" test can be overcome by adopting the language of Title VII, 42 U.S.C. § 2000e-2(e)(2), which applies to organizations which are "in whole or substantial part owned, supported, controlled or managed by a particular religion or particular religious corporation, association, or society, or if the curriculum of a school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion."

The necessity for such an exemption should be rather obvious. A review of the Title IX regulations makes it very clear that there are a number of religious institutions which, for sincerely-held religious reasons, cannot comply with the regulations published by the Department of Education's Office for Civil Rights. Sections §106.40 and §106.57 of the Title IX regulations regarding marital and parental status of students and employees, for example, prohibit recipients from applying rules which treat students differently on the basis of sex by considering a students parental or marital status. They also prohibit a recipient from excluding any student from its education program or any activity on the basis of the students pregnancy or related conditions. According to Section 106.39, a recipient is required to treat pregnancy or any related condition, including abortion, as any other temporary disability with respect to any medical or hospital benefit or plan which the recipient offers students. Not only do these regulations impose a burden on religious freedom for those religious groups whose religious tenets would not permit compliance, but they are also inconsistent with other statutory exemptions like that in Title VII, 42 U.S.C. §2000e(k), which expressly protects conscientious opposition to abortion funding.

Section 106.57 contains nearly identical requirements with respect to employees as those outlined in §106.40 regarding a religious institution which prohibits students or employees who are pregnant and are not married from participating in education programs or continuing in employment, even though they may have valid doctrinal reasons for doing so. Cf., e.g., Dolter v. Wahlert High School, 483 F. Supp. 266 (1980) (unmarried pregnant teacher fired by religious high school stated claim for sex-discrimination). Cases such as Dolter raise the spectre of government scrutinizing in detail the religious reasons behind certain employment practices. Under our Constitution, it is not for government to force changes in doctrinally-based practices on the grounds that they are inconsistent with public policy. Compare, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, which prohibited precisely such inquiries. There is no question that religious organizations, including churches, will be covered by Title IX under the definition of "recipient" contained in S. 2568. It is unwise, in my judgment, to force dissenting religious believers to mount constitutional challenges to the statute or the regulations when a bit of legislative foresight might make them unnecessary.

Failure to Grant Exemptions Under Existing Law

Perhaps the most telling reason to broaden the religious exemption of Title IX is the failure of the Department of Education to process requested religious exemptions under Title IX. It is my understanding that since the enactment of Title IX, the Office for Civil Rights has had approximately 200 requests for exemptions from Title IX under the more restrictive "control" language of the statute. Few, if any, of these requests for exemption have ever been processed, even though they raise serious questions of conflict with religious doctrine. This is inexcusable.

Because many of these exemptions have been pending for so many years, it is reasonable to assume that the Department simply does not know what to do with them. There are no standards which govern the granting of a religious exemption in the statute or the regulations, and the case law under the first amendment is far from clear. Thus religious institutions which receive indirect aid under S.2568 will adhere to their religious beliefs and practices at their peril unless Congress acts to protect their rights. The type of information sought by the Department to justify a claimed exemption--"the religious tenets which allegedly conflict with the regulation"--leaves an incredible, and probably unconstitutional, amount of discretion to decide religious questions in the hands of a bureaucracy which has demonstrated by its inaction that it is unsympathetic at best to the nearly 200 requests for exemptions which have been on file for years. Not surprisingly, the Department of Education has apparently sought to discourage requests for such exemptions by deleting the space on its assurance forms to claim the religious exemption .

In my judgment, therefore:

1) Title IX should be amended to broaden the religious exemption to include all institutions:

> "in whole or substantial part owned, supported, controlled or managed by a particular religion or particular religious corporation, association, or society, or if the curriculum of a school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion".

2) The statute should provide that the Department of Education must grant an interim exemption under Title IX if a request is not acted upon by the Office of Civil Right within 90 days from the time the exemption is requested upon the showing of a *prima facie* Free Exercise Claim. (*i.e.*, that its beliefs are *sincerely-held* and that they are religiously based); any remaining burden should then shift to the government (or person challenging the action in a private suit) to *disprove* the need for the exemption, or demonstrate that there is a compelling state interest and no less burdensome alternative which can accommodate the religious practice. This is the standard allocation of proof in a Free Exercise claim. Adding it to the statute will save considerable time, litigation expense, and difficulty for all concerned. Most importantly, it will provide guidance to those who are charged with analysis of exemption requests.

3) Private suits against religious organizations should be barred during the period while a request is pending.

4) The Department of Education should also be instructed to include a provision for claiming a religious exemption on the assurance forms used by the Department.

The provision of S.2568 which allows for enforcement by "private attorneys general" makes these changes all the more necessary. A request for religious exemption should place the burden of *disproving* the need for such an exemption on the government, or the individual seeking to avoid it, once a *prima facie* claim of conflict with religious doctrine has been made. The 90 day interim exemption rule suggested above would prohibit private suits from tying up religious institutions in lengthy and expensive litigation in order to protect their First Amendment rights. The threat of the attorney's fees for plaintiffs and the expense of self-defense for religious institutions must not be permitted to stifle religious freedom and expression.

Thomas Jefferson and Roger Williams, the founder of the State of Rhode Island, both early advocates of separation of church and state, argued strenuously that separation of church and state was intended primarily to preserve religious freedom. Separation of church and state is a policy which should protect the free exercise of religion. If it does not protect religion, it is a failure. "Separation" does not and cannot be permitted to mean separation *on the state's terms*. We cannot allow the civil rights laws cannot to be used as an inroad for increasing government regulation of religious endeavor. Free *Exercise* of religion, it should be remembered, is a fundamental constitutional right. It has equal stature with freedom of the press, and, like freedom of the press, it does not easily survive the heavy hand of government.

Mr. Chairman, I thank you for this opportunity to supplment the record.

Senator Dole. Mr. Clayton?

STATEMENT OF JACK CLAYTON, WASHINGTON REPRESENTATIVE, AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS

Mr. Clayton. In keeping with your wishes, if my testimony will be entered into the record, I shall just make a few points.

Senator Dole. Without objection, your statement will be inserted into the record.

Mr. Clayton. I am Jack Clayton. I am Washington representative for the Association of American Christian Schools and the schools and churches that are members of my association include some of the oldest civil rights organizations in the country such as the Ketocton Association of Regular Baptists.

Certainly, without their activities, they would—James Madison would not have supported a Bill of Rights to the Constitution.

They influenced Patrick Henry, Thomas Jefferson, and George Washington and we do not yield the high moral ground to anyone on civil rights.

We are concerned that the definition of recipient is so broad that it is totally open and that roads, water, sewage, fire protection, banking, electricity, health services, even the air we breath have all had Federal dollars spent on them and we wonder are we recipients all.

Even the U.S. Commission on Civil Rights in this report, as far back as 1975, recommended that tax exemption be construed as Federal financial assistance, thus triggering title IX regulations.

And of the four statutes, I would just mention the title IX regulations. In 1972 Congress passed only 37 words in title IX of the Education Amendments of 1972.

Two years later HEW, at the time, printed 16 pages of triple-column fine print regulation outlawing, among other things, school rules against illigitimacy, abortion. You cannot even inquire about marital status.

And as with ERA, it does not say no discrimination against women. It says no discrimination on the basis of sex. Federal courts are increasingly using that phraseology to legalize homosexuality.

Eastern Airlines, last year, lost a case to a transvestite that had a sex change operation. And we contemplate with horror the first time any kind of teacher or any employee or anyone who wants to drag one of our churches into school over this kind of perversion.

It does not matter whether we win the case or not. We do not want the grounds there to even go into court because we increasingly find that our rights are violated by the Federal courts.

I would point out also that this legislation would destroy the remaining principles of federalism in our Constitution which is so vital to the protection of our freedom.

The concept of separation of powers in our Constitution did not merely mean separation of powers into three Branches of the Federal Government, but retaining certain reserve powers for the States and for the people.

By such an excessively broad definition of recipient you could find almost every institution and entity by the ambiguity of this language finding itself defined as a recipient thus triggering these Orwellian statutes.

I would point out that again this word discrimination is such an abused word. I have here some quotes from a Civil Rights Commission report.

Here they—in a publication entitled "Sex Bias In The U.S. Code," the U.S. Commission on Civil Rights recommended lowering the age of sexual consent to age 12.

We consider it an affront to common decency that such perversion be allowed to take place in the name of civil rights.

We object to being taxed to support such filth. Thomas Jefferson said it is immoral to compel a man to furnish funds to support our ideas which he finds abhorrent.

We not only find it abhorrent, we find this despicable.

I would conclude, Mr. Chairman, that our forefathers paid a dreadful price to win civil rights for everyone and my people are very sympathetic to old people, to handicapped people, the racial minorities, to women.

I have a daughter. I have a wife. I want the best for them, but it is a perversion and a corruption of our system to redefine these moral issues into terms of civil rights in such a corrupted and perverted way that we stand accused of violation of civil rights.

We would like this bill amended so that this kind of sociological fascism could not be inflicted on our people.

Senator DOLE. Thank you very much, Mr. Clayton.

[The prepared statement of Jack Clayton follows:]

PREPARED STATEMENT OF JACK CLAYTON

My name is Jack Clayton. I am the Washington Representative of the American Association of Christian Schools. None of our member schools accepts any government funds. Most of the 1150 schools in my association are educational ministries of churches. These churches closely share the same deeply felt commitment to religious liberty as thousands of other independent congregationally governed churches that similarly preach and teach Biblical Christianity.

As heirs to the most precious prize of civil liberty which was won by our Christian forefathers, these churches must now be guardians of that sacred trust and defend civil rights for all. Supporters of my association include churches from one of the oldest civil rights organizations in the nation, the Ketocton Association of Regular Baptists. It was the Ketocton member and Baptist preacher John Leland who persuaded the reluctant James Madison to add a Bill of Rights to the U.S. Constitution. Another Ketocton member and Baptist preacher Jeremiah Moore was arrested for preaching without state approval. He later presented to Thomas Jefferson a petition containing 10,000 signatures pleading for religious liberty. Jefferson instructed that his gravestone record that he was the author or the Statute of Virginia for Religious Freedom. However, historian William W. Sweet writes:

> But justice compels the admission that Jefferson's part in this accomplishment was not so great as that of James Madison, nor were the contributions of either or both as important as was that of the humble people called Baptist.

President George Washington called the Baptist "firm friends of civil liberty."

Historian George Bancroft wrote that, "Freedom of conscience, unlimited freedom of mind, was from the first a trophy of the Baptists."

This concept of liberty was not anarchistic, however. The Baptist preacher John Leland wrote, "there never was a time when there was greater exertion made to harmonize the liberty of every citizen, with the energy of government."

The venerable sage George Mason warned that the blessings of liberty requires constant recurrence to fundamental principles. Therefore, to recur to these little-known facts from our history causes us to see that the roots of our civil liberties are not well understood. It suggests caution when changing our laws lest the dearly purchased civil rights can be trampled in a fit of thoughtlessness.

There is justifiable fear that a spirit of heedless inattention has permitted the egregiously misnamed "Civil Rights Act of 1984" to make alarming progress toward passage. Proponents of the bill have maintained that it does not "break new ground." Nothing could be further from the truth. This legislation would, if passed, radically change our present form of government, bring federal domination to most public and private institutions, and undermine morality at every level.

The first and principal objection to S. 2568 is the nearly total inclusivism of the term "recipient" of federal financial assistance. Even the smallest subunit of any public or private agency, institution, government or entity will cause the entire larger unit to be termed a recipient if any federal funds are paid to another entity or person who in turn pays funds to the aforementioned list of organizations or entities.

The ambiguity in the definition of recipient alone promises years of litigation. Who or what cannot be said to be an indirect recipient of federal financial assistance? Roads, water, sewage, police, fire protection, banking, electricity, parks, health services, and even air to breathe have all had federal dollars spent on them in some way. Are we recipients all?

Ominously, the U.S. Commission on Civil Rights has recommended that tax exemption be construed as federal financial assistance, and that the Internal Revenue Service be required to issue Title IX (sex) and Title VI (race) regulations. This alone would federalize most private organizations.

Our second area of concern is the bureacratic authoritarianism that is created whenever recipient status sets in motion four statutes concerning sex, age, race and handicapped persons. Conflicting demands would be inevitable. The regulatory harassment would cause chaos in small organizations without financial resources to combat it.

Of the four statutes, let us consider the effects of but one, Title IX of the Education Amendments of 1972. The 37 words in Title IX that Congress passed in 1972 simply prohibited discrimination on the basis of sex in any program or activity that receives federal financial assistance. In 1974 the old Department of Health, Education and Welfare translated the 37 words into 16 pages of triple-column fine print regulations.

These regulations outlawed school rules against illegitamacy, abortion and other forms of immorality. Educational institutions were forbidden to "discriminate" on the basis of marital status. Couples living together out of wedlock became commonplace, thus undermining morality.

As with the Equal Rights Amendment, Title IX does not say "no discrimination against women." Both prohibit discrimination "on the basis of sex." This language is used to foster homosexuality and other kinds of perversion. In 1983 federal Judge John T. Grady ordered Eastern Airlines to reinstate a transvestite who had been fired for, among other things, having a sex change operation. Such federal judges are totally unfit to hold office, let alone to judge cases concerning educational institutions. Yet, S. 2568 would throw schools at the mercy of such judges.

Finally, the legislation would destroy the remaining principles of federalism upon which this nation was founded. The separation of powers written into the Constitution not only divided federal power into three branches, but it also provided for certain reserved powers to belong only to the states and the people. This has been a bulwark against totalitarianism in the past, but reserved powers which already have not been eroded would be totally destroyed, thus paving the way to tyranny.

Therefore, the civil rights won by our forefathers are in greater peril than at any time in our history. My association does not contemplate with any joy the prospect of ambitious lawyers being begged by the provisions of this legislation to endlessly litigate, and in the name of civil rights to destroy civil rights.

Our Christian forefathers paid a dreadful price to help win for everyone the precious Bill of Rights. It was written totally to limit the power of the federal government. In a corrupt judicial fabrication known as "incorporation" the Bill of Rights has been grandly inverted by a lawless judiciary from the people's protection to limit the power of the federal government into a weapon of unlimited power to be used against the now protectionless people.

The final end run around the Bill of Rights would result from passage of this legislation which would unlease the forces of sociological fascism against a nation of recipients. Civil liberty would cease to exist.

S. 2568 should either be rejected or amended so that only those institutions that clearly accept cash grants can be classified as recipients for purposes of the Act.

Senator DOLE. Ms. Gardner.

STATEMENT OF EILEEN GARDNER, HERITAGE FOUNDATION

Ms. GARDNER. Mr. Chairman, members of the subcommittee, my name is Eileen Gardner and I represent the Heritage Foundation at this hearing.

Heritage is a private, nonprofit foundation studying public policy. I am here to comment on S. 2568, the Civil Rights Act of 1984.

Let me begin by saying that this legislation adopts a very strange definition of civil rights, one that is certainly not shared by the majority of Americans.

It seems to me that the desirability of this legislation turns on the desirability of effects-based civil rights law.

Your subcommittee has already heard substantial testimony as to the legal impact of S. 2568. I doubt that I can add very much to the legal analysis and I will not try.

Suffice it to say that it appears quite clear to me that if this legislation becomes a law it has the potential for writing firmly into law a civil rights process which is terribly divisive and destructive.

Given the history of race relations in the United States it seems to me that under the Constitution the Federal Government has only one obligation: that is to remove the legal barriers to achievement by blacks and other minorities wherever they occur.

I say that the Government has one obligation, but I would like to put the point rather more strongly. Not only is that all the Government is obligated to do. That is all it can do consistent with the U.S. Constitution.

As the Supreme Court said in *Brown* v. *Board of Education* just 30 years ago, the Government and its instrumentalities cannot treat the races different.

Race, and by extension, other classifications such as national origin or ethnicity cannot be used to single out individuals or groups for special treatment.

This subcommittee does not need to be told that this basic goal of legal equality among individuals has already been achieved in the United States.

The day has mercifully gone when State legislatures are permitted to establish different facilities for whites and blacks and when the Federal Government can imprison individuals because of their national origin.

In other words, no agency of Government can intend to discriminate and write that intent into valid law.

Unfortunately, some now seem to be bent on taking us beyond that point.

Some Federal and State regulations, though not the laws themselves, now appear to require not equal treatment by the agencies of Government, but unequal treatment in order to achieve an equality of result.

In my view, this course is wrong. And to the extent that S. 2568 strengthens dependency, it should be resisted strongly.

As mentioned, it is the place of Government to enable individuals to make choices freely and without restraint. It is not the place of Government to compel the outcome of those choices.

Compelling choice "annuls individual freedoms" and it "defeats the end for which man was created."

This misguided policy mistakes the cause of racial and ethnic separation, which most often results from free choices of individuals.

People are different. They make different choices. If the result of those choices is segregated housing patterns and schools of predominantly one race or another that is no reason for Government's action.

True civil rights includes the right to choose. Civil rights cannot constrain a given result, which by definition, would violate true freedom.

Ms. GARDNER. I would make the point that the overwhelming majority of all Americans of whatever race, creed or color, reject the restriction of rights based on race.

All of them know, and that knowledge is borne out by survey after survey, that Government cannot rectify racism by racism. I think that they recognize that any Government that has the power to assign by race to help them also has the power to assign by race to hurt them.

The most dangerous aspect of this kind of affirmative power is the legitimation of overarching Government power. That is what we must avoid, and that is what I am afraid that this legislation does not avoid.

Others have spoken of its specific effects, of its extension of governmental power into the farthest reaches of our lives, of its blurring of distinctions between public and private, between State and Federal. Those are real fears, and we should not be afraid to examine this legislation closely just because it is an election year, and because the title of the bill contains the words civil rights.

Mr. Chairman, I thank you for this opportunity to testify.

Senator HATCH. Well, thank you so much. We appreciate having you here.

I apologize for all of you that I had to be gone for a while, and I certainly am appreciative of Senator Dole for helping me out.

We will now turn to Diane White of Concerned Women for America.

STATEMENT OF DIANE WHITE, CONCERNED WOMEN FOR AMERICA

Miss WHITE. Mr. Chairman, we appreciate the opportunity of appearing before you. My name is Diane White. I am an attorney and I am here in my capacity as congressional liaison for Concerned Women for America, which is an organization of over 235,000 women and men.

Concerned Women for America was organized to protect the rights of the family through prayer, education and action, and I am speaking today in opposition to S. 2568.

Several of the other witnesses have offered thoughtful and well-researched oral and written statements listing many of the potential problems associated with the language of S. 2568. We join in those reservations and take this opportunity to emphasize some of the dangers of this bill.

We, as Christian women, believe strongly that legitimate rights must be protected, but we strongly resist any effort to use the guise of equal rights for women as the basis for denying religious freedom and for extending the reach of the public governmental sector over the private sector.

Grove City College is unique in that it receives no direct Federal assistance. We believe that the Supreme Court was wrong in holding that the receipt of Pell grants by some Grove City College students constituted Federal assistance, requiring the college to sign assurance of compliance forms, agreeing that the school would not discriminate.

We believe that the law should not require such agreement in the *Grove City College* case where Federal funds go to the students rather than the college. Obviously, then, we are opposed to any attempt to extend the requirements of compliance with Federal civil rights laws, as S. 2568 does, to an entire institution.

There are several reasons for this position, but they can probably best be summarized in the belief that this nation was founded upon the ideal of a limited Federal Government. The entire underlying philosophical basis of the bill, and the extensive Federal regulation of the private sector it requires, are repugnant to the principles upon which this Nation was founded.

We are grieved that there appears to be so little reverence for our national heritage of limited Federal involvement in our Nation's affairs. We do, indeed, seem to have the conquest of the private sector by the Government, as was stated last week.

The broad definition of recipient in S. 2568 may be construed to include a college where a student is a Social Security beneficiary, or is employed by a Federally funded project.

The cost of compliance, especially in the case of small colleges and businesses may put them out of business. In addition, as has been pointed out, the regulations are far reaching in that they include any "successor, assignee or transferee of any governmental body or institution receiving Federal assistance."

One of the gravest problems associated with the Government regulation of private schools is that the Government infringes upon academic freedom in the process of enforcing these regulations. This was one of the concerns expressed by the president of Grove City College.

For example, a private school may want to have separate courses for men and women in certain areas. They have the right to do so. However, the Government bureaucrats, in the name of public policy may disagree, and insist upon combined classes despite the preference or religious convictions of college administrators, teachers, students and families, all of whom support this institution.

This is the type of absurd result that has occurred and will occur with this bill.

As Bruce Hafen, president of the American Association of Presidents of Independent Colleges and Universities, stated in his written testimony of May 30 before this committee:

> Intrusive laws and regulations relating to family life and sex roles can be harmful to church-related colleges in two ways. One way is for the State to assume for itself the value transmission role by imposing, in a nearly totalitarian way, "one comprehensive order of meaning" about such personal questions. The other way is for the State to imply by its regulatory authority that the nation's official and legally enforced value position about the role of the sexes is one of unisex neutrality, which is itself a value position so potent that it seems to mark any contrary view as illegitimate. Either way, a chill comes over the campus atmosphere, and the very soul of a church-college is threatened. Church-related colleges and universities desire independence, not so they can discriminate, but so they can be discriminating about many of life's ultimate questions.

And some of the specific illustrations cited by President Hafen in his testimony, as has been discussed by Mr. Clayton include the fact the current title IX—

> Regulations appear to require schools to be blind to the occurrence of abortion or extramarital sexual activity in decisions relating to school policies or student discipline. Yet many religiously oriented and other institutions believe there are serious moral principles at stake in such student behavior. Their commitment to these principles is unquestionably undermined by regulations that prohibit inquiries into or actions based upon marital or parental status, pregnancy or termination of pregnancy.

We believe that S. 2568 is an attempt to fix a problem that does not need fixing. The true problem is found in that part of the *Grove City College* case holding that the mere receipt of Pell grants by individual students was assistance to that college.

It is this issue which should be the subject of legislative action. It is the Government domination of the private sector and the chilling effect government regulations have on the freedom of speech and the freedom of association that is significant about this bill.

Thank you very much for holding these hearings, and for encouraging the public debate on this crucial issue.

Senator HATCH. Thank you. We will now turn to Eva Auchincloss of the Women's Sports Foundation.

STATEMENT OF EVA AUCHINCLOSS, WOMEN'S SPORTS FOUNDATION

Ms. AUCHINCLOSS. Thank you, Senator Hatch, very much for giving me this opportunity to express the real concerns of the Women's Sports Foundation regarding the future effectiveness of title IX.

The Women's Sports Foundation is a nonprofit, educational organization devoted to the promotion of sport and fitness for all women. This organization has over 125,000 individual members, and represents more than 50 million people through its member organizations; that includes the Women's International Bowling Congress, the national sport governing bodies, the Girl Scouts USA, the female softball players, soccer players, aerobic dancers, runners, and, of course, every young woman engaged in sports activities in schools today.

Additionally, I represent the concerns of some of America's greatest athletes, Billie Jean King, Peggy Fleming, Patty Berg, Donna de Varona, Wilma Rudolph, Bruce Jenner, Jim Plunkett, and celebrities such as Dinah Shore, Astronaut Sally Ride, Peanuts creator Charles Schulz, and U.S. Olympic Committee president and former Secretary of the Treasury, William Simon, plus a host of others who jointly wired President Reagan asking for his support of new legislation to clarify the original intent of title IX to have institution wide effect.

Senator HATCH. Could I interrupt you for a second?

I don't think that's the issue here. Like I said, I am willing to lead the fight for institutionwide coverage of title IX. I believe we could get almost everybody in the Congress to vote for it, and I think we could have a bill this year.

Ms. AUCHINCLOSS. I think that's what we need, Senator Hatch.

Senator HATCH. I agree. I have had to work my way to this with the help of a lot of good women who helped me out in Utah, who were against title IX to begin with, but gradually came around. Not all of them were against it; some were for it, but a number of them were against it.

Ms. AUCHINCLOSS. I think that was a misunderstanding.

Senator HATCH. At the beginning, because they had heard about some of these bizarre things. But you would be happy, I take it, if we could overrule Grove City and make it institutionwide?

Ms. AUCHINCLOSS. That is correct.

That's what we're after.

Senator HATCH. Well, as you can see, there is a willingness to do that and see that this bill goes through. Where we have difficulties is in all of these ambiguities and other problems with the bill. Up till now, the Leadership Conference on Civil Rights has been unwilling to have any amendments. I think if they continue to maintain that posture, or they continue to want this bill with all of these ambiguities and ramifications in, I don't think any bill's going to go through this year.

Ms. AUCHINCLOSS. I think our position is that it is terribly important that a bill get put through this year.

Senator HATCH. I'm with you.

Ms. AUCHINCLOSS. And that you all sit down together and work it out to the best of your ability.

Senator HATCH. Well, then, I'm with you.

Ms. AUCHINCLOSS. And the rest of my statement can go into the record.

Senator HATCH. Sure.

I would like to help you in that regard, and I think that's not only a reasonable request. You've seen the Secretary of Education say that's what he would like to have happen, and the head of the Civil Rights Division of the Justice Department said he'd go along with that.

I don't have any doubt the administration would be at the forefront of it. But the real problem with this bill is that it's far more than that. It isn't just a matter of trying to protect civil rights throughout the country, it's an injection of the Federal Government into areas that it has never been involved in before.

Ms. AUCHINCLOSS. Well, that's the supposition that it is. It isn't actually proven that it is.

Senator HATCH. Well, I don't think many lawyers looking at it would disagree that there is a very high probability that it will result in the injection of the Federal Government into areas that they have never been involved in before, into State and local governments private institutions.

That's the problem. But I just pledge to you, we will try and work that out for you, and I just want to make it clear on the record that I think we could have this bill this year.

But I have to be honest with you, if those who are sponsors of this bill say that it's got to come through without amendment or with this type of language, I personally don't believe you're going to have any bill this year.

I think that's what it comes down to, because there are just too many people who perceive these ambiguities.

I have to admit, what you want, I want. I think we could get almost everybody in Congress to go with it.

Ms. AUCHINCLOSS. Thank you, Senator Hatch. That's what we wanted to hear, and I will go back and tell my constituents that that is what's going to happen, I hope.

Senator HATCH. It's only going to happen if there is a real effort to try and resolve this so that it's a narrow overrule of the *Grove City* case. I think the burden of proof in these areas is upon those who are proposing this particular bill. They have to demonstrate that it won't have these deleterious and adverse effects that have been described here, not only by me, but by many others, including the chief of the Civil Rights Division of the Justice Department.

Ms. AUCHINCLOSS. Thank you, Senator Hatch. I have just one point that I would like to make. I would like to remind you that there is a college in the Southern part of the United States, Mercer College, that immediately after the *Grove City* case was decided, cut the number of scholarships that they offered to their female basketball players and left the men's the same.

I have heard you speak today about these small colleges. This kind of financial pressure on these small colleges is going to make them take discriminatory types of action, which I consider that to be. And that is what we also want to be protected against.

Senator HATCH. But if we could overrule the *Grove City* case with a reasonable bill.

Ms. AUCHINCLOSS. It would stop action of this sort.

Senator HATCH. I think it would go a long way toward resolving true discrimination against women in our schools and in other areas, as well.

So I commend you for your statement and for being here today.

Ms. AUCHINCLOSS. Thank you.

[The prepared statement of Eva S. Auchincloss follows:]

PREPARED STATEMENT OF EVA S. AUCHINCLOSS

Mr. Chairman and Members of the Committee:

Thank you very much for giving me the opportunity to express the real concerns of the Women's Sports Foundation regarding the future effectiveness of Title IX. My name is Eva Auchincloss. I am the Executive Director of the Women's Sports Foundation, a non-profit educational organization dedicated to the promotion of sport and fitness for all women.

This organization has over 125,000 individual members and represents more than 50 million people through its member organizations. That is the four million women members of the Women's International Bowling Congress, the hundreds of thousands of members of the National Sport Governing Bodies represented by the United States Olympic Committee, the 2,725,000 members of the Girl Scouts U.S.A., the 5,400,000 female softball players, the 2,200,000 female soccer players, the over 15 million female aerobic dancers, the 17 million women runners and, of course, every young woman engaged in sport activities in schools today.

Additionally, I represent the concerns of some of America's greatest athletes, such as Billie Jean King, Peggy Fleming Jenkins, Patty Berg, Donna de Varona, Carol Mann, Wilma Rudolph, Chris Evert, Bruce Jenner, Jim Plunkett, John Nabor and celebrities such as Dinah Shore, astronaut Sally Ride, Peanuts creator Charles Schulz and U.S. Olympic Committee President and former Secretary of the Treasury William Simon and a host of others who jointly wired President Reagan asking for his support of new legislation to clarify the original intent of Title IX to have institution-wide effect.

Last November, the Women's Sports Foundation and the United States Olympic Committee sponsored here in Washington, D.C., a national conference, the New Agenda for women's sports. At that conference, Sen. Ted Stevens advised the assembly that the single most important legislation for women's sports is Title IX, and that the continuing effectiveness of Title IX should be the group's greatest concern.

The assembly unanimously adopted a resolution to support institution-wide coverage of Title IX. This same resolution was also unanimously adopted at the U.S.O.C. House of Delegates meeting this spring.

There has been a great deal of testimony that defends and opposes Senate Bill 2568. There have also been hundreds of conjectures, suppositions and what-ifs concerning the potential effects of this legislation. I do not believe I need to reiterate any of that. Nor will I try to dissect the legal language of S 2568.

Instead, I am here to speak to you about the expectations of the constituency I represent. They want action to be taken by the members of Congress and the President of the United States to protect the rights of women to receive equal educational opportuniti We want you to pass corrective legislation for Title IX that will assure us that women will have that equal opportunity to participate in all educational programs including athletics. To be very clear, we are supporting any legislation, including S 2568, which will provide that protection, and we will not accept any legislation that does not provide that protection. We want no compromise on this issue.

We take this position because the Grove City decision gives us no assurance that athletics will be under the jurisdiction of the Title IX legislation in the future. Without corrective legislation, girls and women in secondary institutions do not have protection as Federal funds rarely if ever directly support school athletic programs. In colleges where there are no athletic scholarships, or where there has not been federal funding of athletic facilities, there is also no protection for women. Even when there is funneling of athletic scholarships through financial aid offices, there is no guarantee under the new interpretation of Title IX that this will be sufficient to trigger Title IX jurisdiction for athletics. Hence, unless Title IX is amended by Congress to clearly affect all educational programs within an institution that receives any Federal funding, Title IX becomes a useless piece of legislation. Equal education for girls and women will then depend on the good will of the male administrators, 86.5 percent of whom are men.

Despite good will, we cannot accept promises and good intentions of college presidents, principals and other school administrators to protect the rights of women for equal opportunity. These people are human. Given budget cuts and financial constraints, these people will, by tradition, deem it less important to provide athletic opportunities for girls than for boys. This point was underscored immediately after the Supreme Court ruling on the Grove City College case, when Mercer College, a small coeducational school in the South, immediately demonstrated its lack of commitment to women. The day after the Supreme Court decision, they reduced the number of basketball scholarships offered to women to four, while retaining the full seven basketball scholarships for men. Additionally, the Office of Civil Rights of the Department of Education has already acknowledged that they no longer have jurisdiction to investigate complaints of non-compliance in athletics when Departments of Athletics do not directly receive Federal financial aid. We know of 18 sex discrimination cases that have already been dropped.

The very existence of Title IX over the past 12 years has created vast opportunities for girls and women in sport and athletic programs, which were almost non-existent prior its passage. Whereas before Title IX was enacted, there were only 16,000 opportunities for girls in collegiate athletic programs, today there are over 150,000 girls participating in intercollegiate athletics.

Whereas there were no scholarships for women before Title IX, today there are more than 10,000 being used by women.

Whereas before Title IX only 7 percent of the interscholastic athletes were girls, by 1982, the percentage had increased to 35 percent of the whole. In fact, girls represent the only growth in school athletics over the past few years.

Whereas prior to Title IX, college athletic budgets for women were an average one percent of the whole, by 1979 they had increased to 16 percent.

These facts prove that any beliefs that girls and women do not want to fully participate in athletic programs are false.

Title IX's effects were not just felt in educational institutions, the same language was included in the Amateur Sports Act of 1978, which extended the protection of the law to equality for women under the jurisdiction of the United States Olympic Committee. We will see the effects of that law this summer when more women will participate in more Olympic events than ever before.

The eyes of the world will be focused on the women athletes this summer. Over a half billion people will be watching the Olympic Games hosted by this country. With ABC's 187 broadcast hours, a lot of that airtime will be devoted to women's sports. It is expected that our women will perform better than ever in these Olympic Games, especially in team sports. Their excellence can be attributed to the growth in opportunities in the high schools and colleges of this country. Many of these athletes will have directly benefited from scholarship programs--programs now left unprotected by the language of our Federal law.

But I am not here just to merely defend the elite and serious athlete. The benefits of early sports experience are life long. If sports are good for boys, they are good for girls. Girls and boys are both human beings. Gender has no effect on the benefits of physical, mental, social and emotional development. And long term, our nation benefits by having all its citizens fully actualized through sports, and made more conscious of the contribution of sport toward their lifelong health.

The constituency that I represent cannot buy the excuse that Federal jurisdiction should be limited to the specific programs within an institution that the government funds directly. This idea is not only in direct conflict with the original intent of Congress for Title IX, but it is in effect, a cop-out--for it allows the appearance of an effective law, when in fact no action of substance can be accomplished.

We do not advocate government interference in areas in which they have no business. But equal educational opportunities are a basic American right which the Federal government must protect.

As was written to Senator Hatch by two Mormon women, I quote: "The American principle of equal access to educational programs was reaffirmed by Title IX. Title IX opened doors previously closed to women. It is impossible to fathom that Congressional legislation reaffirming this American principle was intended to apply only to very narrow areas of educational institutions. Rather, the intent was to apply legislative pressure through the only avenue available, Federal funds, to the entire institution.

"You are in the perfect position to bring effective, clarifying legislation which could speedily restore Congressional leadership on the path to equal access to educational program pure from any unrelated, negative, amendments. The long list of Senate sponsors for this legislation demonstrates their commitment to this principle."

Since the Supreme Court has decided that the Title IX legislation was written so that it does not have institution-wide effect, then it is the responsibility of Congress to immediately take corrective measures. To do any less is to let down over half of our population--women. For the right of it and the health of it, we ask you to move this legislation along for speedy passage.

Thank you very much.

March 22, 1984

Dear President Reagan:

The Title IX legislation of the 1972 Equal Education Act has been the single most important factor in providing opportunities for girls and women in athletics. Although it was the intent of Congress that Title IX legislation apply to athletics and all other educational programs, the recent Supreme Court decision on the Grove City College case makes it necessary for Congress to pass clarifying legislation regarding the language of the law.

We are publicly supporting any legislation which will clarify the original intent of Title IX. We also urge you to firmly back this legislation. Your leadership in this endeavor will be greatly appreciated by all sports interested citizens including ourselves. We look forward to hearing from you.

Thank you.

William Simon
Jack Kelly
Rafeo Johnson
John Naber
Charles Schulz
Jim Plunkett
Mike Erozione

Billie Jean King
Peggy Fleming Jenkins
Janet Guthrie
Wilma Rudolph
Donna de Varona
Carol Mann
Lt. Col. Micki King Hogue
Diana Nyad
Sally Ride
Rosalynn Summers
Katherine Switzer
Bonny Warner
Willye White
Patty Berg

women's sports foundation 195 moulton, san francisco, ca. 94123 (415) 563-626

DECLARATION FOR WOMEN'S ATHLETICS

STATEMENT IN SUPPORT OF TITLE IX, THE
1972 EDUCATION AMENDMENT, AND AS
INTERPRETED BY H.E.W. IN DECEMBER 1978.

"In the interest of developing all Americans as healthy, strong and physically sound individuals we, the undersigned, declare that the teaching of physical fitness and athletics are and should be an important and integral part of all school programs; that all children and adults in our educational systems should have an equal opportunity to discover their full physical potential through all physical education, athletic and sport programs; that H.E.W. enforce Title IX, as it pertains to physical education, athletics and sports; that girls and women should be taught to develop their full physical potential; that legislation which would deprive girls and women of any equal opportunity in sports is against the best interests of all Americans. For these reasons we ask Congress to stand firm on its intent to include athletics within the scope of Title IX and we ask the President to use the power of his office to enforce this legislation."

ENDORSERS OF DECLARATION
As of September 13, 1979

NATIONAL SPORT ORGANIZATIONS

Amateur Athletic Union
A.A.U. Synchronized Swimming Committee
A.A.U. Women's Judo Division of U.S.A.
Amateur Softball Association of America
American Association for Health, Physical Education, Recreation, and Dance
Association for Intercollegiate Athletics for Women
Group Fore Women's Professional Golf Tour
International Women's Professional Softball Association
Ladies Professional Golf Association
National Archery Association of U.S.A. & College Division
National Association for Girls and Women in Sport
National Jogging Association
National Junior College Athletic Association
United States Amateur Confederation of Roller Skating
United States Badminton Association
United States Field Hockey Association
United States Fiqure Skating Association
United States Handball Association
United States Racquetball Association
United States Ski Association
United States Table Tennis Association
United States Volleyball Association
Women in the Wilderness
Women's International Bowling Congress
Women's Professional Basketball League
Women's Professional Bowling Association
Women's Professional Football League
Women's Sports Foundation & Associations

INDIVIDUALS

Billie Jean King
Bruce Jenner
Joan Joyce
Kathrine Switzer
Donna de Varona
Janet Guthrie
Carol Mann
Lacey O'Neal
Karen Logan
Mary Jo Peppler
Micki King Hogue
Janie Blalock
Nancy Lopez
Cathy Rigby Mason
Sheila Young
Al Oerter
Jacki Sorensen
Marilyn King
Arthur Ash
Martina Navratilova
Suzy Chaffee

OTHER NATIONAL ORGANIZATIONS

American Association of University Professors
American Association of University Women
American Civil Liberties Union
B'Nai B'Rith Women
Explorer Division of Boy Scouts of America
The Girls Glubs of America
Girls Scouts of U.S.A.

GROWTH STATISTICS IN WOMEN'S PARTICIPATION IN SPORTS

High School Participation*

	1970-71	1974-75	1980-81	1982-83
basketball	132,299	307,608	409,894	401,511
volleyball	17,952	198,313	265,120	269,049
softball	9,813	110,140	184,701	219,515
tennis	26,010	84,495	124,171	120,869
track and field	62,211	307,467	397,768	371,645
swimming	17,229	73,946	68,585	76,261

The total number of high school girls participating in interscholastic competition rose from 294,051 participants in 1970-71 to 1,779,972 participants in 1982-83.

*The numbers for 1970-71 and 1974-75 have Canadian athletes figured into the statistics; the numbers, therefore, reflect a higher number than the actual number of American high school interscholastic athletes. After 1975, Canadian athletes were dropped from the statistics.

Also, while in some sports there has been a drop in participation, one of the reasons is because there are now more sports from which girls can choose. The overall numbers of female high school participants, however, continues to increase.
(Information from The National Federation of State High School Assns.)

College Participation (NCAA member institutions only)*

	1976-77	1980-81	1981-82	1982-83	1983-84
basketball	10,859	9,305	9,624	10,242	10,262
volleyball	9,356	8,009	8,418	8,656	8,731
softball †	6,310	7,947	7,465	8,035	8,226
tennis	7,127	6,355	6,599	6,976	7,037
track and field	5,831	8,309	9,217	9,785	9,756
swimming	5,969	6,143	6,218	6,627	6,774

*Numbers for NCAA female athletes before 1976 are unavailable since most women's athletic departments were members of AIAW, which is now defunct.
†The numbers for 1976-77 and 1980-81 for softball reflect both fast and slow pitch, while the numbers after 1981 reflect only fast pitch.
(The National Collegiate Athletic Association)

The total number of female collegiate athletes, including NCAA, NAIA, and AIAW institutions, rose from 60,000 in 1971-72 to approximately 150,000 in 1983-84.
(Linda Carpenter, Department of Physical Education, Brooklyn College)

Aerobic Dance

Ten years ago, there were no surveys that counted participation in aerobics. Today, there are 15 million people who participate in aerobics, 95% of whom are women.
(The President's Council on Physical Fitness and Sports)

Bowling

In 1970-71 the Women's International Bowling Congress had 3,058,977 members; in 1982-83, there were 3,947,229 .
(Women's International Bowling Congress)

Running

Ten years ago, there were fewer than 1 million female runners in the U.S. Today, based on several national surveys, there are over 19 million female runners.
(The Presidents Council on Physical Fitness and Sports)

The 1978 Bonnie Bell women's 10K running circuit had approximately 20,000 runners; in 1983, there were over 60,000 runners.
(Bonnie Bell, Inc.)

The 1978 Avon women's running circuit (including 5Ks through marathons), had 3,000 runners in 11 races; in 1983, 50,000 runners competed in 50 races.

The Avon women's marathon grew from 211 participants in 1978 to 1,200 participants in 1983.
(Avon Products, Inc.)

Soccer

The number of registered women's soccer teams went from 245 in 1980 to 2,448 in 1981.
(The U.S. Soccer Federation)

Softball

In 1972, there were 101,859 girls and women playing softball on teams registered with the Amateur Softball Assn. In 1980, the number rose to 470,440; and in 1983, there were 583,927 girls and women playing softball on ASA teams.
(Amateur Softball Assn.)

Volleyball

In 1970-71 there were 1,513 women registered with the U.S. Volleyball Assn. In 1975, there were 7,900; in 1980, there were 8,855; and in 1983, the figures rose to 12,666.
(U.S. Volleyball Assn.)

Olympics

The number of women participating in the Olympics rose from 781 in 1968 to 1,274 in 1976 to a projected 2,500 in 1984.
(United States Olympic Committee)

May 24, 1984

Senator Orrin Hatch
United States Senate
Washington, D.C.

Dear Senator Hatch,

We are very disappointed that your May 16th breakfast meeting with the New York/New Jersey L.D.S. Lawyers Group was cancelled. The opportunity to visit with you was one we had anticipated with enthusiasm.

Perhaps we may at least visit with you by letter if not in person. First, let us introduce ourselves. We are both active members of the Brooklyn Ward of the New York, New York Stake. Our bachelor's and master's degrees are from Brigham Young University, our Ph.D.'s are from the University of Southern California and Linda's J.D. is from Fordham Law School. We are both on the physical education faculty at Brooklyn College of the City University of New York and Linda is also an attorney in New York State. We are currently in our eighth year of a national, longitudinal study on the effects of Title IX on women's intercollegiate sports.

This introduction serves to express the nature of our backgrounds as we discuss with you the issue of equity: more specifically, legislation clarifying Title IX and the opportunity for women to have equal access to sports participation specifically and educational opportunities in general. So, we are speaking with you today as L.D.S. women serving in the academic and legal communities with substantial educational and research expertise in the area of women's sports.

We have enclosed a very brief summary of our research for your use. It demonstrates the large growth of intercollegiate athletic opportunities for women from one year before the Title IX compliance date through 1984. The benefit of the presence, if not enforcement, of Title IX is even more startling if it is realized that five years before the passage of Title IX, opportunities existed for only 16,000 college women to participate in athletics. Today, it is safe to say that over 150,000 women have the opportunity to participate in intercollegiate athletics and thereby more fully expand their God-given talents in this area.

Mormon women share in this excitement for sports participation. Just last week, for instance, Church leaders informed us with pride that the sisters eighteen and over are participating in Church athletic programs in numbers ten times those of only a year ago. One out of every two women on the Brigham Young University campus is now an active participant in some aspect of the University's sports program. This expansion of sports participation among your female constituents is consistent with the gospel principle of individual progression. Further, it promotes the health of the body/temple which serves as the source for the vigor used to accomplish our earthly tasks leading to eternal goals.

Girls and women in Utah have substantial opportunities in sport, but according to the Director of Women's Sports for the Church, even they desire fuller opportunities. Church leaders have repeatedly said, positive sports experiences are to be sought after. The benefits of such experiences serve males and females equally. Surely in our schools the opportunities to attain these benefits should be equally present for both sexes.

Without Title IX enforcement, the stated 'good intentions' of school administrators are already demonstrating their ephemeral nature. In 1984 86.5% of women's intercollegiate athletic programs are under the supervision of a male head athletic director and almost 40% of women's programs have no female involved in the administration at all. Thus, women are no longer in positions where they can effectively lend their voices to the carrying out of the 'good intentions'.

The growth of women's sports has not interferred with men's sports. On the contrary, it has increased the national pool of citizens gaining from and appreciating sports participation. The same can be said for every aspect of the educational experience which Title IX more fully offers women.

We need your help. Women in other states are not as fortunate as those in Utah. The American principle of equal access to educational programs was reaffirmed by Title IX. Title IX opened doors previously closed to women.

It is difficult to fathom that Congressional legislation reaffirming this American principle was intended to apply only to very narrow areas of educational institutions. Rather, the intent was to apply legislative pressure through the only avenue available, federal funds, to the entire institution.

You are in the perfect position to design effective clarifying legislation which could speedily restore Congressional leadership on the path to equal access to educational programs pure from any unrelated, negative amendments. The long list of Senate sponsors for such legislation demonstrates the commitment to the principle.

For the health of it, for the joy of it, for the right of it, exercise your ability to assist in the process and the women of the nation will respect your statesmanship.

Sincerely,

R. Vivian Acosta

R. Vivian Acosta, Ph.D.
Associate Professor

Linda J. Carpenter

Linda J. Carpenter, Ph.D., J.D.
Professor

Department of Physical Education
Brooklyn College of the City University of New York
Brooklyn, New York
11210

Senator **Hatch**. We will now turn to Martin Gerry.

STATEMENT OF MARTIN GERRY, ATTORNEY

Mr. **Gerry**. Mr. Chairman, I appreciate the opportunity to testify today, and I would like to briefly read a short statement.

Senator **Hatch**. I would appreciate it if all of you could summarize in as short a time as you can. We will put your complete statements in the record.

Mr. **Gerry**. I would like to first express my appreciation to the committee for its invitation to appear to consider S. 2568, the Civil Rights Act of 1984, and it is a pleasure to appear together with my friend and former colleague at the Department of Health, Eduation and Welfare, Cynthia Brown.

Before commenting on the effects and merits of S. 2568, I would like to briefly summarize my background and experience as it's relevant to the legislation. During the period 1969 to 1977, I served in a variety of civil rights policy development and policymaking positions within the Office for Civil Rights of the Department of Health, Education and Welfare, and on the staff of HEW Secretary Elliot Richardson, and HEW Secretary Caspar Weinberger.

In 1975, I was appointed director of the Office for Civil Rights by President Ford, and served in that capacity until January of 1977. In this position, I was responsible for the overall administration and enforcement of title VI, title IX, and section 504 within the Department.

During the past 7 years, 1977-84, my experience with the interpretation and application of these and other civil rights laws has broadened in three related but different ways. Since March of 1977, I have served as special counsel to the Wednesday Group of the U.S. House of Representatives, and have been actively involved with several members of the Wednesday Group in the evaluation and preparation of a wide variety of civil rights legislation, including H.R. 5490.

During these same years I have provided extensive legal and consultative assistance to over 35 State agencies and to scores of local agencies seeking to implement and comply with Federal civil rights laws.

I have drafted State laws and regulations, developed interagency agreements, designed State health and education financing systems, and trained State and local government officials in both civil rights policy development and in the monitoring of civil rights compliance.

Finally, over the last 7 years, I have had occasion both to represent parent and advocacy organizations in Federal court litigation and to serve as an expert consultant on Federal civil rights laws and policies to several U.S. District Courts.

After carefully reviewing the provisions of S. 2568, as well as the recent decision of the U.S. Supreme Court in *Grove City* v. *Bell*, and on the basis of my experience and my understanding of the Supreme Court's decision in the *Grove City* case, I am convinced, as I know you are, that prompt passage of legislation, and particularly of S. 2568, is of crucial importance.

Without this action, I believe the vitality, integrity, and rational application of four civil rights statutes which together represent a major portion of the Federal statutory commitment to equal opportunity and social justice for all Americans, will be mindlessly sacrificed.

I believe that S. 2568, when enacted, will do no more than restore the legal and administrative interpretations relied on by the Johnson, Nixon, Ford, and Carter administrations concerning the jurisdictional reach and sanctions available under these statutes.

I am equally convinced that absent prompt passage of S. 2568 the implications of the *Grove City* decision for the actual administrative operations of both Federal departments and regulated agencies and organizations are frightening.

The increased administrative and accounting burdens on regulated agencies, the new intrusion of Federal civil rights agencies into the detailed financial operations of those agencies and the inevitable increase in private civil rights litigation would be unavoidable byproducts of the *Grove City* decision.

Thus, not only would the approach arrived at by the Supreme Court weaken and ultimately frustrate the administration and enforcement of current nondiscrimination provisions, but it would also result in Federal interference in the daily operations of thousands of State and local and private agencies and organizations in a way previously unimaginable.

Finally, I can discern no basis under either a rational or moral social policy for adopting the narrower approach to civil rights jurisdiction dictated by the definition of "program or activity" adopted in the *Grove City* decision. I do not believe that Congress ever intended such a narrow interpretation, and it is frankly, ludicrous on its face to adopt the position that so long as women are not discriminated against, in administration of Federally supported student financial assistance programs, it is not unlawful for the same women to be discriminated against either in the underlying admissions process or in all aspects of postadmission treatment

Perhaps more important, I believe that the American people continue to possess that basic sense of fairness and justice which has always provided the structure for social and legislative progress, and in my judgment, S. 2568 provides the Congress with a simple, straightforward, and now crucially needed vehicle to reestablish a fair and just approach to the administration of Federal civil rights laws.

Mr. Chairman, I regret to say that I think that Assistant Attorney General Reynolds was, in fact, the main architect of this problem, and it seems to me somewhat ironic that he now offers himself to the Congress as a neutral helper in framing the solutions.

We would like, with your permission, following Ms. Brown's testimony, to briefly address the six objections which Assistant Attorney General Reynolds specifically raised concerning the language of the proposed legislation earlier today, and explain briefly why we believe that the language proposed in S. 2568, by the sponsors, is more than adequate, as currently drafted, to accomplish the stated legislative objectives.

Senator HATCH. Could I ask you to submit that in writing, and we will place it in the record right at the end of Ms. Brown's testimony?

Mr. GERRY. We can do that, Senator. If you would permit me to make, then, instead of that, just two or three quick points, and then we'll submit for the record, I think there are just two or three things that haven't come out at all that might be relevant.

Senator HATCH. Go ahead.

Mr. GERRY. And I understand the time pressure.

The first one that's very important is that the idea that private schools and universities and higher education institutions of this country are not now subject to Federal civil rights laws. Title VII of the Civil Rights Act, Federal equal employment opportunity legislation, has for many years applied to these institutions. And the same institutions that Secretary Bell testified about, and the same institutions which I believe you are considering exempting possibly by amendment, have complied with those Federal civil rights laws and have been subject to that jurisdiction of title VII for well over a decade.

In fact, they haven't lost their independence, they haven't lost their ability to operate without Federal interference, and a rational balance already exists between the administration of Federal civil rights laws which have applied as I say for over a decade to the same, to Grove City, to Hillsdale, and to all the other independent colleges and universities.

I have met with President Roach, and with others when I was in HEW. During President Ford's tenure, this issue came up, and the President was quite concerned about it. And I honestly believe that the execution of a one page promise to comply with Federal civil rights laws, which is what is actually required of colleges and universities, that assurance is not a major intrusion into the operation of these institutions. And certainly it doesn't represent any more intrusion than has been true in equal employment opportunity under title VII.

Second, I think that there's been a lot of testimony about words and new words and what these words mean, and Assistant Attorney General Reynolds went into some lengthy discussion of that.

I would simply point out that in the title VI regulations as it has existed now for many years, and in the section 504 and title IX regulations, many of the words that Mr. Reynolds testified that the Congress has to clarify have been in those regulations. I'll read them: entity, successor, assignee, transferee. And there are a list of them that were brought up as if they have never been part of Federal civil rights regulations or laws before.

I would simply submit that they've been in those regulations for up to 20 years. They haven't provided a problem in terms of the interpretation and, in fact, most of the legislative language that he challenged uses terms that have either been in other civil rights statutes or are, it seems to me, no less complicated or difficult to interpret.

Finally, there are two specific points that I think are very misleading. First, the idea that Federal funds freeing up other resources would be, at least in the view of the House sponsors, many of whom are members of the Wednesday Group, for whom I work, would free up—the free up concept was not the intention of the sponsors, and I don't think it's the plain meaning of the word "support." I think the language is fairly clear.

In recognition of the time, we'll submit more on these points. But I think there is some fairly misleading testimony that's been offered to the committee. And do recognize that it's very difficult to draft this kind of complex language. It was difficult on the House side. But I do think that S. 2568, as it's currently drafted, is a realistic, fair piece of legislation.

Senator HATCH. I don't think it's difficult to draft an overrule of the *Grove City* decision. This goes far beyond that.

Mr. GERRY. Senator, I honestly don't believe that, and I know you do, and I know that there are areas of dispute, but I would like to have an opportunity to try to convince you that while I know that the Assistant Attorney General has argued that, the practice of over 20 years of both Republican and Democratic administrations is simply inconsistent with his analysis.

Senator HATCH. I think his point about ambiguity is well taken. But be that as it may, let's see what we can do to resolve this. I would like to resolve this. I would like to resolve it in a fair and reasonable way.

If what we want to do is overrule the *Grove City* case, I think that can be done; I think it can be done simply. I think it can be done with definitive language. And I think it can be done in the best interests of everybody. We can have a bill this year. If what we want to do is pass it this year, I think we're a long way from doing it with the present language.

I just think it's going to be a difficult thing.

Mr. GERRY. You made a statement, and I—if I may——

Senator HATCH. Sure.

Mr. GERRY. I appreciate your letting me respond. But you made a statement earlier which I fully understand which is that the burden seems to be on the proponents to justify language, and I understand that. And that seems logical to me. But it seems to me that the language that is used actually is based on existing language. Some phrases were removed, and I think we can explain. For example, the language about the exclusion of the ultimate beneficiary, that language, that phrase has not been present in the title IX regulations since it was created. It's in title VI, and it's not in section 504. The fact that it was left out, that is, that it's not in the title IX regulation has never posed a problem, either administratively or judicially. In fact, over a period, now, of almost 10 years, it has, in effect in practice, become unimportant.

That's why, I suspect, it was left out of the drafting of this bill.

Senator HATCH. I suspect the real problem, Mr. Gerry, is that people just don't trust the courts of this country. They just don't want to turn these issues over to unelected judges. The liberals don't want to have Reagan judges deciding these things. I suppose the conservatives don't want to have Carter judges deciding these things. They would rather have these things defined in Congress where they should be defined.

I think we can solve this problem if there's really an interest in doing so; I think we can do it in the best interests of everybody and have a bill. That's all I'm saying, and I would like to see that done.

But I just feel very strongly that if there isn't that kind of an effort made, there isn't going to be any bill.

And I'm not going to say that I'm going to prevent it; I'm saying that I know people who feel very, very strongly on this issue in the Senate. And, frankly, with the legislative schedule there is, you're going to have to have pretty much of a consensus in order to get a time agreement. It's that simple.

Mr. GERRY. If you would permit me one more comment having to do with the *Baby Doe* case which I know you asked a question about and on which I wanted to correct Mr. Reynolds' testimony.

I am counsel for the parent and disability organizations, seven major organizations, in the *Baby Doe* case. And we have participated in all of the cases on the side of the administration and on the side of the regulation.

Mr. Reynolds, in answer to your question, testified that this legislation, as currently drafted, in his judgment, would have no effect on the enforcement of *Baby Doe* cases.

I strongly believe that that's not true. Mr. Reynolds, to my absolute knowledge has argued, and argued on several occasions both inside the administration and outside, that the so-called Grove City problems, both of them, the indirect nature of medicaid assistance, and the "program or activity" language formed a barrier to his enforcement, that is, the Department of Justice's enforcement of the President's directive, expressed directive to enforce section 504.

So I know for a fact that the Department of Justice has asserted the very problems that would be corrected by this legislation as reasons why they are not currently enforcing section 504.

Senator HATCH. Thank you. Ms. Brown?

TESTIMONY OF CYNTHIA BROWN, THE EQUALITY CENTER.

Ms. BROWN. Thank you, Mr. Chairman. I'll summarize my remarks.

My name is Cynthia Brown and I am codirector of the Equality Center, a nonprofit organization to advance human and civil rights. I have had over 18 years of direct professional experience, both in and out of Government, with the enforcement of Federal civil rights laws. During the Carter administration, I was the first Assistant Secretary for Civil Rights in the Department of Education; prior to that, I was the principal Deputy Director of the office in the Department of HEW.

I was also a career employee of HEW's Office for Civil Rights in the years 1966–1970.

Given by extensive knowledge and very long experience with Federal enforcement of antidiscrimination laws, there was no one more shocked than I was with the Supreme Court's decision in *Grove City College* v. *Bell.* That decision incorrectly and harmfully restricted the coverage of title IX of the Education Amendments of 1972.

The decision was surprising, because every administration charged with enforcing title IX, as well as title VI of the Civil Rights Act of 1964, after which title IX was modeled, has interpreted coverage of these antidiscrimination laws in the same broad manner. Furthermore, in the 20 years since passage of title VI, Congress has taken no action to indicate it disagreed with the interpretation of broad coverage of legislation modeled after it—title IX, section 504, and the Age Discrimination Act.

S. 2568 is intended to respond to the *Grove City* decision and restore for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the executive branch since 1964. Charges by the Assistant Attorney General for Civil Rights that this bill would constitute a major expansion of civil rights jurisdiction for the Federal Government and for private litigants, in my judgment, is just completely wrong.

Each of the four statutes amended by S. 2568 was enacted to ensure that Federal funds would not be used in any way to support discriminatory activity based on race, national origin, sex, handicap, or age. The most aggressive and successful civil rights enforcement activities directed at Federal fund recipients historically have been carried out by the Office for Civil Rights in HEW and by the two offices in the HEW successors, the Department of Education and the Department of Health and Human Services.

I would like to digress for a moment to comment on another point made by the Assistant Attorney General. It had to do with his concern about overlapping attention to the same institution by a variety of departments which might give grants to that institution—for example, in the case of a university, grants from the Department of Defense and Department of Transportation, as well as from the Departments of Education and Health and Human Services. Ever since the enactment of title VI, every administration has worked out administrative arrangements among departments, in writing, so that one Department is given the lead agency responsibility for a particular type of institution. Therefore, in the case of education, prior to the creation of the Department of Education, HEW had responsibility for all allegations of discrimination at federally funded educational institutions.

The Department of Defense and the Department of Transportation delegated their responsibility for making sure their funds did not go to discriminatory activities in education institutions to HEW. Those agreements are in writing; they still exist. So the overlap problem is really a problem that does not exist in fact, and I am somewhat surprised that both the Assistant Secretary for Civil Rights and the Assistant Attorney General made statements as if it were a problem today. I think if they look at the records, it's not.

In the 20 years since this enforcement process has been used, a large number of highly controversial civil rights issues have arisen and been resolved. Fierce challenges have been raised to OCR enforcement policies and practices, but only occasionally have challenges been made to the scope of coverage or other procedural issues under these statutes. None of these coverage challenges have ever been accepted by any administration before the current one. Congress has endorsed no limitations.

Examination of how the process worked in the latter half of the 1960's might be interesting. It was during that period that the greatest number of fund terminations took place.

In the 1960's, of the statutes amended by S. 2568, only title VI had been enacted. It was used primarily to address school segregation in the South, an issue on which little progress had been made, despite the passage of 10 years since the Supreme Court decision in *Brown* v. *Board of Education*. From the beginning, Federal enforcers applied title VI on a school districtwide basis. If a school district received Federal funds, discriminatory practices were identified and addressed in every school engaging in such practices, whether or not a federally funded program operated in that school. For example, districts were required to eliminate segregated high schools even though in many districts only their elementary schools operated federally funded programs, usually under title I of the Elementary and Secondary Education Act. If the reasoning of the *Grove City* decision had been applied back then, it is questionable whether HEW would have had the authority to require the desegregation of such high schools.

The scope of coverage is broad in order to identify and seek resolution of the full range of discriminatory practices in an institution. However, each antidiscrimination statute limits the scope of fund termination. Section 602 of title VI, as well as parallel sections of the other statutes, requires that should fund termination take place, the Department may terminate only those funds where there is a nexus between the discrimination found and the Federal funding to be terminated. S. 2568 preserves this requirement while restoring an agency's broad investigative powers and by extension, its power to refer cases to the Department of Justice.

I could go on and talk about the specificity of the title IX and section 504 regulations, which are broader than title VI, and I think are another indication that broad application of these laws was intended. The title IX regulations came out under a Republican administration. Section 594 came out under a Democratic administration. They're both very broad, and I think another indication that coverage was never an issue.

Great progress has been made in opening access to institutions and programs to those previously excluded through the enforcement of title VI, title IX, section 504 and the Age Discrimination Act. In my judgment, the *Grove City* decision greatly undermines this important process for achieving equity. Already, as Secretary Bell reported, many institutions are alleging lack of jurisdiction and objecting to OCR investigations. The prior witness pointed out cutbacks by an institution in scholarships for women, as a result of this decision.

Unless S. 2568 is adopted, Federal civil rights enforcement, in my judgment, will be permanently damaged. That would be terribly unfortunate, because while there has been great progress in providing equal opportunity for program beneficiaries of institutions receiving Federal fund support, the job is not completed. And it may never be if the narrow interpretation of the Supreme Court is allowed to stand.

Thank you.

[The prepared statement of Cynthia G. Brown and material subsequently submitted follows:]

PREPARED STATEMENT OF CYNTHIA G. BROWN

Mr. Chairman and Members of the Subcommittee:

My name is Cynthia G. Brown. I am the Co-Director of The Equality Center, a non-profit organization to advance human and civil rights. Among other things, The Equality Center engages in research and analysis of issues of importance to low-income families and individuals, minorities, women, and the disabled. A major activity of The Center is a study of civil rights enforcement in education which will recommend new ways to strengthen the enforcement of federal civil rights laws.

I appreciate your invitation to testify at the oversight hearing on civil rights policy in light of the Supreme Court decision in the Grove City College case. In my judgement, enactment of S.2568, which has been proposed in response to this decision, is vital if the promise of the great antidiscrimination laws passed by Congress is to continue to be realized.

I have had over 18 years of direct professional experience, both in and out of government, with the enforcement of federal civil rights laws. During the Carter Administration I was the first Assistant Secretary for Civil Rights in the Department of Education and prior to that, I was the Principal Deputy Director of the Office for Civil Rights in the Department of Health, Education, and Welfare (HEW).

I was also a career employee of the HEW Office for Civil Rights for four years from 1966 to 1970. It was during that period of time that by far the greatest number of administrative hearings were held and that the greatest number of fund terminations took place -- procedures and practices directly relevant to the purpose of this hearing. Specifically, during those years, I began as an investigator examining southern school segregation problems and became the Special Assistant to the chief of the entire civil rights education program.

Between my two periods of government service, I worked for the Children's Defense Fund and the Lawyers' Committee for Civil Rights Under Law. In each organization, one of my responsibilities was to monitor and comment on the activities of the Office for Civil Rights.

Given my extensive knowledge and very long experience with federal enforcement of antidiscrimination laws, there was no one more shocked than I was with the Supreme Court's decision in Grove City College v. Bell. That decision incorrectly and harmfully restricted the coverage of Title IX of the Education Amendments of 1972 which prohibits sex discrimination against both students and employees in any educational "program or activity receiving federal financial assistance." The decision was surprising because every Administration charged with enforcing Title IX, as well as Title VI of the Civil Rights Act of 1964 after which Title IX was modeled, has interpreted coverage of these antidiscrimination laws in the same broad manner. Furthermore, in the 20 years since passage of Title VI, Congress has taken no action to indicate it disagreed with the interpretation of broad coverage by Republican and Democratic Administrations alike for Title VI or the antidiscrimination statutes patterned after it -- Title IX, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

S.2568 is intended to respond to the Grove City decision and restore for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the Executive Branch since 1964. Charges by present Justice Department officials, as reported in the press, that this bill "would constitute a major expansion of civil rights jurisdiction for the federal government and for private litigants" are patently absurd.

In order to demonstrate the absurdity of this interpretation, I thought it might be useful: 1) to review how the antidiscrimination statutes applicable to federal financial assistance have been enforced, especially by HEW and the Department of Education; and then 2) to examine activities at different points in time which demonstrate that broad coverage of these laws has always been intended.

Each of the four statutes amended by S.2568 was enacted to ensure that federal funds would not be used in any way to support discriminatory activity based on race, national origin, sex, handicap, or age. The most aggressive and successful civil rights enforcement activities directed at federal fund recipients historically have been carried out by the Office for Civil Rights (OCR) in HEW and by the two OCRs in the HEW successors -- the Department of Education and the Department of Health and Human Services.

Each OCR carries out its enforcement responsibility under Title VI, Title IX and Section 504 by investigating complaints filed by individuals and groups, and by conducting agency-initiated compliance reviews of selected institutions. Before an investigation is begun, OCR determines whether the institution receives federal financial assistance. Since the beginning of these enforcement activities, OCR has assumed jurisdiction to eradicate any type of discrimination prohibited by statute and regulation once an institution was identified as a federal fund recipient. Prior to an investigation no attempt was made to trace federal assistance to the specific activity in which there was suspected or alleged discrimination.

Each statute requires that recipients found to have violated the law be given an opportunity to comply voluntarily. Voluntary compliance is obtained in over 98 percent of the cases. In the vast majority of these cases, institutions readily agree to correct illegal practices when presented with evidence of a problem. In those cases where voluntary compliance is not possible, the statutes require a Department either to initiate administrative proceedings, which could lead to the termination of federal assistance, or to refer the matter to the Department of Justice for litigation.

In the Departments of Education and Health and Human Services where the fund termination process is selected, the recipient is given an opportunity for a hearing before an independent administrative law judge. Decisions of the administrative law judge may be appealed to a Reviewing Authority. Funds can be terminated by the Department Secretary after the Reviewing Authority has heard the case. If funds are terminated, recipients can appeal to the appropriate United States Circuit Court of Appeals.

Age Discrimination Act enforcement follows a somewhat different process. All federal enforcement agencies, including the two OCRs, must forward age discrimination complaints which they receive to the Federal Mediation and Conciliation Services (FMCS) which attempts to resolve them through mediation within 60 days. For complaints not resolved by FMCS, the process described above for the other statutes is followed.

There have been few challenges to Executive Branch interpretation of coverage under these statutes.

In the 20 years that this enforcement process has been used, a large number of highly controversial civil rights issues have arisen and been resolved. Fierce challenges have been raised to OCR enforcement policies and practices. But only occassionally have challenges been made to the scope of coverage, or other procedural issues under these statutes. None of these coverage challenges have ever been accepted by any Administration before the current one. Congress has endorsed no limitations.

An examination of how the process worked in the latter half of the 1960s might be useful. It was during this period that the greatest number of fund terminations took place (Between 1966 and 1982, 220 recipients had their funds terminated by HEW or the Department of Education -- 197 school districts, 5 higher education institutions, and 18 health or social service facilities. All but 4 of these fund terminations took place before 1970.)

In the 1960s, of the statutes amended by S.2568, only Title VI had been enacted. It was used primarily to address school segregation in the South, an issue on which little progress had been made despite the passage of 10 years since the Supreme Court decision in Brown v. Board of Education. From the beginning, federal enforcers applied Title VI on a school district-wide basis. If a school district received federal funds, discriminatory practices were identified and addressed in every school engaging in such practices, whether or not a federally funded program operated in that school. For example, districts were required to eliminate segregated high schools even though in many districts only their elementary schools operated federally funded programs, usually under Title I of the Elementary and Secondary Education Act. If the reasoning of the Grove City decision had been applied back then, it is questionable whether HEW would have had the authority to require the desegregation of such high schools.

The scope of coverage is broad in order to identify and seek resolution of the full range of discriminatory practices in an institution. However, each antidiscrimination statute limits the scope of fund termination. Section 602 of Title VI, as well as parallel sections of the other statutes, requires that should fund termination take place, the Department may terminate only those funds where there is a nexus between the discrimination found and the federal funding to be terminated. In other words, according to the statute, the termination of power "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." S.2568 preserves this requirement while restoring an agency's broad investigative powers and, by extension, its power to refer cases to the Department of Justice.

In the fund termination proceedings of the past such a distinction between broad coverage and more limited termination arose in some cases. The Fifth Circuit Court of Appeals spoke on the issue in 1969 in the case of Taylor v. Finch clarifying that "the termination power reaches only those programs which would utilize federal money for unconstitutional ends." HEW followed carefully this guidance of the statute and court. For example, in September, 1970 the HEW Reviewing Authority, the administrative appeals body, ruled that the federal funds of the Jasper, Texas school system must be terminated for all schools in the district despite the fact that only the elementary schools but not the junior and senior high schools remained segregated. The Reviewing Authority reasoned that:

> Absent a unitary school system, any federal money used to assist in the general educational program of such a system would be the utilization of federal money for unconstitutional ends, since the Constitutional requirement is for a unitary system and not for unitized pockets within a non-unitized system. If the program, using federal money, is unconstitutional, then the termination power obtains as to that program. In the instant proceeding, the Respondent's whole general elementary and secondary educational program is unconstitutional because, in maintaining pockets of segregation within its system, it is not operating a unitary, non-racial system.

The specificity of the Title IX and Section 504 regulations is another indication that broad application of these laws was intended.

Regulations under Title IX were issued by HEW in 1975 by a Republican Administration, and the Section 504 regulations were issued in 1977 by a Democratic Administration. Both sets of regulations are much more detailed than the Title VI regulations. Both spell out examples of illegal practices which take place in programs not directly, but only indirectly, supported by federal funds. For example, the Title IX regulation states compliance standards for intercollegiate athletics and extracurricular activities. The Section 504 regulation requires the provision of auxiliary aids to beneficiaries of all hospital and social service programs if those institutions or agencies employ 15 or more people. Under the General Education Provisions Act, Congress is provided the opportunity to disapprove an educational regulation in whole or in part by a concurrent resolution. No such resolution has ever passed with regard to Title IX or Section 504.

The scope of coverage issue was raised from time to time under Title IX with regard to intercollegiate athletics. In an opinion of April 18, 1978 the HEW General Counsel reaffirmed Title IX coverage of intercollegiate athletics. In addition, Congressional failure to adopt proposed exclusions to this coverage, makes clear that Congress intended that Title IX apply to intercollegiate athletics.

Great progress has been made in opening access to institutions and programs to those previously excluded through the enforcement of Title VI, Title IX, Section 504 and the Age Discrimination Act. In the education area, the gains have been dramatic:

- Schools in the South formerly segregated by law are now desegregated; in 1964, less than one percent of southern black youngsters attended predominantly white schools. By 1980, 43 percent of these students were in predominantly white schools and only 23 percent were in schools with 90 to 100 percent minority student enrollment.
- Segregation in the assignment of black and white teachers in virtually every large city in the North (as well as the South) has been eliminated.
- Black enrollment in postsecondary institutions increased 92 percent from 1970 to 1979; Hispanic enrollment more than doubled and the enrollment of women increased by 66 percent in the same time period. These figures compare with an 8.3 percent increase in white male postsecondary enrollment between 1970 and 1979.
- In 1980, approximately 830,400 limited and non-English-speaking students were participating in bilingual education classes which were rarely offered before the last decade.
- Participation of women and girls in interscholastic and intercollegiate sports has jumped tremendously -- 500 percent in interscholastic and over 100 percent in intercollegiate athletics between 1972 and 1979.
- The number of disabled youngsters who needed but did not receive special education declined from 463,000 in 1976 to 22,610 in 1980.

Since the mid-1960s Congress has provided substantial funds for programs to aid students with special educational needs. These funds have provided a federal "carrot" to accompany the federal "stick" of civil rights enforcement, particularly the threat of federal fund termination. The growth in the amount of federal funding has been a powerful stimulus for institutions to settle discrimination cases brought by OCR and has helped bring about the progress cited above.

The Grove City decision greatly undermines this important process for achieving equity. Already many institutions are alleging lack of jurisdicition and objecting to OCR investigations. Unless S.2568 is adopted, federal civil rights enforcement will be permanently damaged. That would be terribly unfortunate because while there has been great progress in providing equal opportunity for program beneficiaries of institutions receiving federal fund support, the job is not completed. And it may never be if the narrow interpretation of the Supreme Court is allowed to stand.

PICKARD AND GERRY

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TELEPHONE
(202) 223-4418

June 11, 1984

Honorable Orrin Hatch
Chairman, Subcommittee on the
Constitution
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Hatch:

During our testimony before the Subcommittee on the Constitution at its June 5, 1984 hearing on S.2568, the "Civil Rights Act of 1984," we requested the opportunity to briefly outline for the Subcommittee our views on the accuracy and significance of several criticisms of the legislation which had been offered to the Subcommittee earlier in the day by Assistant Attorney General William Bradford Reynolds. In response to our request, you asked that we provide the Subcommittee with a written summary of our views.

Because a transcript of the testimony actually provided to the Committee is not available to us, we have relied on the written Statement submitted by Mr. Reynolds to the Subcommittee on June 5, and on our notes of his responses to questions asked by members of the Subcommittee. Six major objections to the current language of S.2568 raised by Mr. Reynolds and our response to each is provided in a brief, outline form below.

(1) The adoption of the definition of "recipient" contained in S.2568 will greatly expand both the types of institutions and the scope of institutional programs covered by the various civil rights statutes.

Title VII of the Civil Rights Act of 1964 has since its inception covered all organizations that employ fifteen or more employees. As a result, Grove City College, Hillsdale College and other independent institutions cited by Mr. Reynolds are and have been covered by major civil rights laws for twenty years apparently without sacrificing their autonomy. While S.2568 applies civil rights protections beyond employment discrimination, the claim that the facilities covered have heretofore been free of Federal civil rights regulation is flatly inaccurate.

The Department of Education and its predecessor (HEW) consistently interpreted receipt of Federal funds by a college as sufficient to bring the entire college under civil rights jurisdiction. S.2568 would not affect the pre-Grove City position on this issue.

(2) The adoption of the S.2568 definition of recipient will vastly expand the coverage of Federal civil rights laws to units of State and local government not now subject to such laws.

In fact, as of 1980 State and local government agencies were subject not only to the basic non-discrimination principle of the Equal Protection Clause of the Fourteenth Amendment but to twenty-four separate Federal non-discrimination laws (see attached Charts) of which only four will be affected by S.2568. Both from a public policy standpoint and from a practical legal standpoint, passage of S.2568 (whether through "trickle up," "trickle down," or "trickle around") would result in no appreciable change in the present situation. Current jurisdiction under one of the statutes, "Revenue Sharing," already reaches virtually all program areas of local government. In the education area, for almost twenty years the vast majority of Federal elementary and secondary funds "pass through" State agencies who are not the ultimate recipients but have been covered by the various statutes without incident.

(3) The omission of the phrase "excluding the ultimate beneficiary" from the S.2568 definition of "recipient" will significantly expand the reach of the current definitions under the four statutes.

The definition of the term "recipient" in the Title IX Regulation signed by President Ford in 1975 has not been the subject of any legal dispute or controversy. By removing the word "person" from the list of direct type of recipients in the existing Title VI and Section 504 regulations, the definition of recipient in S.2568 improves upon the wording of the Title IX regulation and creates the first clear definition consistently applicable to all four statutes.

(4) Enactment of the definition of "recipient" contained in S.2568 will create major burdens on Federal and State agencies because of overlapping jurisdictional reach by different Federal funding agencies.

During the Johnson, Nixon, Ford and Carter Administrations numerous interagency agreements were established to preclude the problem of overlapping jurisdiction under Title VI, Title IX and Section 504. Delegations of authorities establishing "lead agency" responsibility for investigation and enforcement of civil rights complaints against different types of regulated agencies (e.g., higher education institutions) easily solved the problem now envisioned by Mr. Reynolds. In fact, by Executive Order, the Attorney General is already charged with ensuring the effective coordination of investigation and enforcement by Federal agencies under these statutes.

(5) The new fund termination provisions of S.2568 will expand the recipient program areas potentially vulnerable to fund cut-off.

In fact, the provisions of S.2568 clarify, and certainly do not expand, the Federal Assistance received by a regulated organization which is potentially vulnerable to fund cut-off. The wording is based on current case law, and therefore, preserves the same fund cut-off remedy which was in place before the Grove City College decision.

(6) The failure of S.2568 to define important terms such as "successor," "assignee," and "subunit" creates an ambiguous and dangerously vague legal framework likely to lead to repeated, protracted legislation.

Current Title VI, Title IX and Section 504 Regulations contain undefined the following terms: "successor," "assignee," "transferee," "entity," "arrangement," and "instrumentality." To date, over a period of twenty years of civil rights enforcement there has not been a signigicant legal dispute over any of these terms.

In addition to these six unsupportable contentions, Assistant Attorney General Reynolds has offered little to support his contention that S.2568 is either an extension of existing law or poorly drafted. Rather he has repeatedly proved truisms such as no legislation can be drafted with such specificity that no questions of interpretation remain and avoided the equally obvious fact that it will be his office in the Department of Justice and not the Federal Courts which is initially charged with ensuring that Congressional intent is followed in the preparation of new regulations to implement S.2568.

We appreciate this opportunity to supplement our testimony and would be happy to meet with you, other members of the Subcommittee, or your staffs to discuss concerns regarding the reach and significance of S.2568. We continue to believe that the bill now before the Subcommittee is a well-drafted piece of legislation which will successfully accomplish the objectives which its sponsors have stated and which you have endorsed.

Sincerely,

Cynthia G. Brown

Cynthia G. Brown
The Equality Center

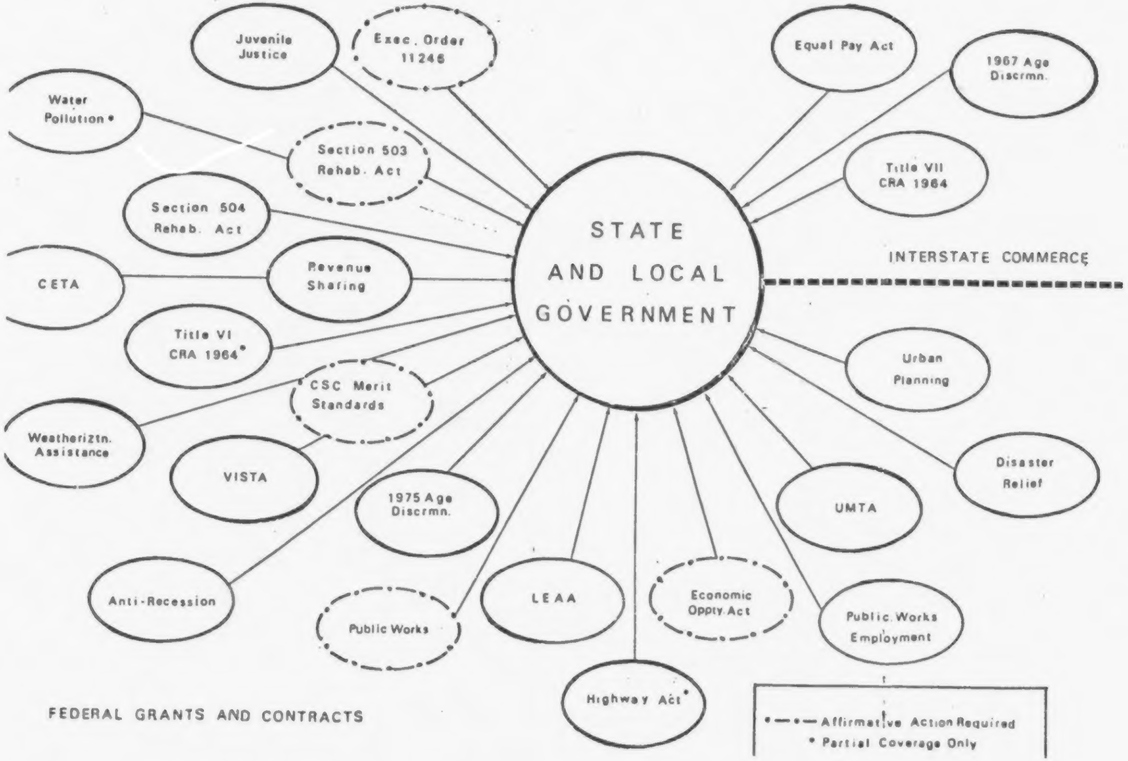
Martin Gerry

Martin H. Gerry
Pickard and Gerry

Enclosure

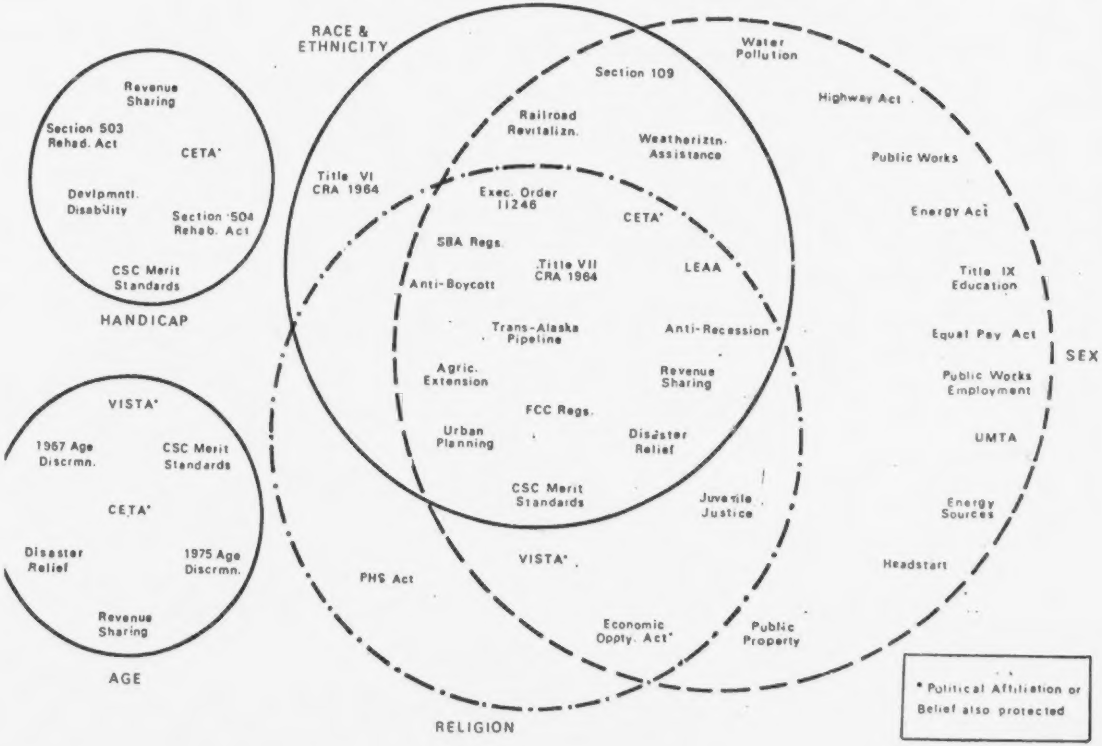
FEDERAL EEO PROVISIONS

Regulation of State and Local Government


STATE AND LOCAL GOVERNMENT
Juvenile Justice
Exec. Order 11246
Equal Pay Act
1967 Age Discrmn.
Water Pollution •
Section 503 Rehab. Act
Title VII CRA 1964
Section 504 Rehab. Act
INTERSTATE COMMERCE
CETA
Revenue Sharing
Title VI CRA 1964*
Urban Planning
CSC Merit Standards
Weatheriztn. Assistance
VISTA
Disaster Relief
1975 Age Discrmn.
UMTA
Anti-Recession
LEAA
Economic Oppty. Act
Public Works Employment
Public Works
Highway Act*
FEDERAL GRANTS AND CONTRACTS
Affirmative Action Required
* Partial Coverage Only

FEDERAL EEO PROVISIONS

Types of Discrimination Prohibited


RACE & ETHNICITY
SEX
RELIGION
HANDICAP
AGE
Water Pollution
Section 109
Highway Act
Railroad Revitalizn.
Weatheriztn. Assistance
Public Works
Title VI CRA 1964
Exec. Order 11246
CETA*
Energy Act
SBA Regs.
Title VII CRA 1964
LEAA
Title IX Education
Anti-Boycott
Trans-Alaska Pipeline
Anti-Recession
Equal Pay Act
Agric. Extension
Revenue Sharing
Public Works Employment
FCC Regs.
Urban Planning
Disaster Relief
UMTA
CSC Merit Standards
Juvenile Justice
Energy Sources
VISTA*
PHS Act
Headstart
Economic Oppty. Act*
Public Property
Revenue Sharing
Section 503 Rehab. Act
CETA*
Devlpmntl. Disability
Section 504 Rehab. Act
CSC Merit Standards
VISTA*
1967 Age Discrmn.
CSC Merit Standards
CETA*
Disaster Relief
1975 Age Discrmn.
Revenue Sharing

* Political Affiliation or Belief also protected

The Current Regulatory Framework

There are thirty-eight (38 separate Federal equal employment opportunity requirements currently applicable to the employment practices of non-Federal government organizations and institutions. The abbreviations for each provision used throughout this report are given in parentheses following each citation:

- Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000-e ("Title VII CRA 1964").
- The Age Discrimination in Employment Act of 1967. 29 U.S.C. 623 ("1967 Age Discrmn.").
- Section 6(d) of the Fair Labor Standards Act of 1938. 29 U.S.C. 206 ("Equal Pay Act").
- Section 503 of the Rehabilitation Act of 1973. 29 U.S.C. 793 (Section 503 Rehab. Act").
- Section 504 of the Rehabilitation Act of 1973. 29 U.S.C. 794 ("Section 504 Rehab. Act").
- Title VI of the Civil Rights Act of 1964. 42 U.S.C. 2000d ("Title VI CRA 1964").
- The Age Discrimination Act of 1975. 42 U.S.C. 6102 ("1975 Age Discrmn.").
- Section 122 of the State and Local Fiscal Assistance Act of 1972. 31 U.S.C. 1242 ("Revenue Sharing").
- Section 112 of the Public Works and Economic Development Act Amendments of 1971. 42 U.S.C. 3123 ("Public Works").
- Sections 208(f) and 703(1) of the Comprehensive Employment and Training Act of 1973. 29 U.S.C. 983 ("CETA").
- 23 U.S.C. 324 ("Highway Act").
- Sections 624 and 748 of the Economic Opportunity Act of 1964. 42 U.S.C. 2971(c) and 2985(g) ("Economic Oppty. Act").
- Section 417 of the Domestic Volunteer Service Act of 1973. 42 U.S.C. 5058. ("VISTA").
- Section 401 of the Energy Reorganization Act of 1974. 42 U.S.C. 5891 ("Energy Sources").
- Section 606 of the Federal Property and Administrative Services Act of 1949. 40 U.S.C. 476 ("Public Property").
- Section 110 of the Local Public Works Capital Development and Investment Act of 1976. 42 U.S.C. 6709 ("Public Works Employment")
- Section 420 of the Energy Conservation in Existing Buildings Act of 1976. 42 U.S.C. 6870 ("Weatheriztn. Assistance").

- Section 16 of the Federal Energy Administration Act of 1974. 15 U.S.C. 775 ("Energy Act").
- Section 803 of the Railroad Revitalization and Regulatory Reform Act of 1976. 45 U.S.C. 803(a) ("Railroad Revitaliz.").
- Section 403 of the Trans-Alaska Pipeline Authorization Act. 43 U.S.C. 1651 (note) (Trans-Alaska Pipeline").
- Section 262 of the Juvenile Justice and Delinquency Prevention Act of 1974. 42 U.S.C. 5672 ("Juvenile Justice").
- Urban Mass Transportation Assistance Act of 1970. 49 U.S.C. 1608 ("UMTA")
- Section 207 of the Public Works Employment Act of 1976. 42 U.S.C. 6727 ("Anti-Recession").
- Section 518(c) of the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. 3701 ("LEAA").
- Section 109 of the Housing and Community Development Act of 1974. 42 U.S.C. 5309 ("Section 109 Housing").
- Title IX of the Education Amendments of 1972. 20 U.S.C. 1681(a) ("Title IX Education").
- Section 1207 of the Higher Education Act of 1965. 20 U.S.C. 1145(b) ("Anti-Boycott").
- 42 U.S.C. 300(a)-7 ("PHS Act").
- 42 U.S.C. 2930(c) ("Headstart").
- Section 106 of the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. 6005 ("Devlpmntl. Disability").
- Title III of the Disaster Relief Act of 1974. 42 U.S.C. 5151 ("Disaster Relief").
- 7 U.S.C. 341-349("Agric. Extension").
- Section 13 of the Federal Water Pollution Act Amendments of 1972 (P.L. 92-500); 33 U.S.C. 1251 (note) ("Water Pollution").
- Executive Order 11246 - 30 F.R. 12985, 32 F.R. 14303 "Exec. Order 11246").
- 47 CFR 73.125("FCC Regs.").
- 24 CFR 600.75 ("Urban Planning").
- 13 CFR 113 ("SBA Regs.").
- 45 CFR 70 ("CSC Merit Standards").

Senator HATCH. Thank you. Ms. Litten?

STATEMENT OF BETTY LITTEN, AMERICAN ALLIANCE FOR HEALTH, PHYSICAL EDUCATION, RECREATION AND DANCE

Ms. LITTEN. Thank you, Mr. Chairman. I am Betty Litten. I am the president-elect of the North Dakota Health Physical Education, Recreation and Dance Association, as well as a track and field coach, physical educator and athlete. I am representing Connie Jo Hepworth who is unable to present her testimony today. She had to leave the hearing early to catch a plane to Salt Lake City.

I am pleased to present this testimony on behalf of the southwest district president of the American Alliance for Health, Physical Education, Recreation and Dance.

I do appreciate your support on women. I will continue with her testimony.

[Connie Jo Hepworth's testimony read by Ms. Litten follows:]

Chairman Hatch, members of the Subcommittee on the Constitution, thank you for giving me the opportunity to speak with you today. I am Connie Jo Hepworth, current Southwest District President of the American Alliance for Health, Physical Education, Recreation and Dance, and a member of the National Association for Girls and Women in Sport.

The American Alliance is a nonprofit membership organization of over 35,000 professional educators in the fields of health, physical education, recreation, dance, and other related disciplines who are working to improve educational programs in the school and community.

I teach in a high school in Salt Lake City. My colleagues are teachers and coaches at the elementary, secondary and higher education levels. I am here today to urge you to pass S. 2568 to restore title IX to its original congressional intent, making it once again a law to insure equal opportunities for each American, regardless of sex, race, handicap, or age.

Title IX has allowed increased participation of girls and women in sports and athletics. Reinstatement of title IX to its pre-*Grove City* interpretation will encourage continued gains for sports enthusiasts, coaches, athletic directors and physical education administrators at the college and secondary level.

Restoration of title IX will insure that women have an equal opportunity for leadership roles in our profession and in other walks of life. It will provide an opportunity for women to obtain jobs as teachers, coaches, athletic administrators, department chairs and college presidents.

It will ensure that employment and hiring practices evaluate applicants in terms of individual qualifications instead of race or sex.

But, passage of S. 2568 will do more than provide equal opportunities in hiring. It will also affect elementary and secondary school programs.

S. 2568 will guarantee that boys and girls throughout their formal education have an equal chance to compete in sports and athletics, a chance to compete for a better future.

As a public school teacher in Salt Lake City, UT, and member of the National Association for Girls and Women in Sport and the

National Dance Association, as well as the southwest district president of the American Alliance, I urge you today to pass S. 2568 without amendments.

Thank you.

Senator Hatch. Thank you. Our last witness, Bea N. Orr is next.

STATEMENT OF BEA N. ORR, PRESIDENT, AMERICAN ALLIANCE FOR HEALTH, PHYSICAL EDUCATION, RECREATION & DANCE

Ms. Orr. Thank you very much, Senator Hatch.

Chairman Hatch, members of the Subcommittee on the Constitition, I am Bea Orr, president of the American Alliance for Health, Physical Education, Recreation, and Dance. The American Alliance is a nonprofit membership organization of 35,000 professional educators in the fields of health, physical education, fitness, sports, athletics and other related disciplines who are working to improve educational programs in schools and communities throughout the United States.

I, personally, am an educational practitioner from a public school system in the State of West Virginia. I am here today to urge you to pass Senate bill 2568.

When people think of our profession and title IX, they think of rigorous amateur athletic competition, high powered training equipment and big athletic budgets. But, although athletics are important, title IX is just not for the elite athlete.

Title IX has opened up new opportunities for women and girls in many areas. Because of title IX, women have a more equal chance to compete today than ever before—compete on the playing field and in their professional lives, compete as athletes, as sports enthusiasts, as teachers, as coaches, as athletic administrators, and as educational administrators.

Title IX ensures that from the elementary school level through high school and college all individuals will be given an equal chance, regardless of sex, race, age, or disability. We believe that Senate bill 2568 will not broaden title IX. S. 2568 will merely return the interpretation of title IX to what it was before the *Grove City* decision.

S. 2568 will return title IX to what Congress originally intended it to be, a law to insure equal opportunity for men and women, boys and girls. A law to ensure fair, balanced and equal competition in athletics and in life.

Your actions today will reverberate into the future for a whole new generation of boys and girls.

On behalf of the physical educators, the coaches, the athletes, and school administrators of today—and tomorrow—I urge you to pass Senate bill 2568 without amendments.

Thank you, gentlemen, for your time.

Senator Hatch. Thank you, Ms. Orr.

We appreciate the sincerity and the effort that has come forth from every witness today. This is a tough issue, as all civil rights issues are. And I'm hopeful we can resolve this. I don't know how it's going to turn out.

But I am committed to title IX. I am committed to trying to resolve these problems. I have mentioned two exceptions that I think we ought to consider that involve such a small number of schools, not known for discriminating. Frankly, I think it's ridiculous to force them to abide by 10,000 words of Federal rules and regulations simply because they have students in attendance who receive GI benefits or ADS Pell grants.

If they were discriminating or they did something that was wrong, that's another matter. But in any event, I am hopeful we can get you a bill this year, but I think it's going to take a good faith effort on the part of everybody in order to do so.

I would like to thank everybody for testifying here today. It means a lot to this committee chairman, even though a number of you have disagreed with my own particular views on this. But that isn't necessarily important. I have been wrong before. Let me say that I appreciate all of you coming, and with that we'll recess until further notice.

[Whereupon, at 6:18 p.m. the subcommittee was adjourned, subject to the call of the Chair.]

APPENDIX

SECTION 1.--ADDITIONAL STATEMENTS

STATEMENT ON BEHALF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES

On behalf of 360 colleges and universities enrolling over 2.5 million students, the American Association of State Colleges and Universities would like to share its views in support of H.R. 5490, the Civil Rights Act of 1984.

In February of this year, the Supreme Court decided in the case of Grove City College vs. Bell that an institution must comply with Title IX only in a specific "program or activity" that receives federal funds. Under this ruling, despite the receipt of federal funds, the rest of the institution is free to discriminate on the basis of sex without violating Title IX. We believe this decision must be corrected promptly through legislation, and we believe H.R. 5490 is a suitable remedy.

The Grove City decision has implications far beyond the scope of Title IX since Title IX's anti-sex discrimination language was modeled after the landmark Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin. In addition, two other statutes are affected by the Grove City decision -- Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination on the basis of handicap, and the 1975 Age Discrimination Act, which bars discrimination on the basis of age. All of these civil rights statutes bar some form of discrimination in entitites that receive federal funds. Their effectiveness has been seriously jeopardized by the Court's decision because for the first time the scope of these statutes has been limited to programs receiving federal funds within institutions and not the entire institution.

Prior to the Grove City decision, every administration charged with enforcing the anti-discrimination statutes - Republican and Democratic alike - interpreted coverage in the same broad manner. Investigation throughout an institution was permitted as long as any "program or activity" within it received federal funds. Investigation and enforcement was not limited to a specific portion or program of an institution. Additionally, in the twenty years since the passage of the first civil rights law, Congress has taken no action to indicate it disagreed with this interpretation. For example, there have been several attempts to amend Title IX in Congress. These proposals have attempted to limit Title IX coverage in athletics, physical education, and choirs, thereby reducing the scope and coverage of the statute. But Congress has never acceded to these proposals. In fact, as recently as last November, the House overwhelmingly reaffirmed its support for a comprehensive interpretation of Title IX.

Mr. Chairman, some of my colleagues in the education community consider this legislation as far reaching and breaking new ground. AASCU does not. H.R. 5490 simply restores for these four statutes the broad scope and coverage intended by Congress and consistently interpreted by the Executive Branch since 1964. AASCU institutions have followed this broad coverage since these statutes were implemented. We are better institutions because of it and H.R. 5490 will help us continue in this direction.

Precisely because of the broad coverage and interpretation of these four civil rights statutes, tremendous strides in access and opportunity have been taken in higher education. For example:

--Between 1970 and 1979, Black enrollment in postsecondary institutions increased 92 percent;

--Since 1970, Hispanic enrollment has doubled;

--Since 1970, enrollment of women has increased by 66 percent.

Since enactment of Title IX in 1972, not one college or university has lost federal funding due to failure to comply with Title IX. Yet due to voluntary compliance of educational institutions, greater numbers of women have been able to take advantage of educational opportunities. For example:

--Since 1972, the number of Ph.Ds earned by women has risen from 16 percent to 31 percent;

--Participation of women and girls in intercollegiate sports has grown 100 percent since 1972. In 1982, about 30 percent of all intercollegiate athletes were women;

--In 1972, college women received less than one percent of the athletic scholarship funds; by 1980, they received 21 percent.

Some of my colleagues have been concerned about past enforcement procedures and future policies that would be implemented if H.R. 5490 were passed. We agree that enforcement procedures are critical and those in H.R. 5490 should not cause problems for higher education institutions. Our only concern is that the Department of Education's Office of Civil Rights be considerate of the particular needs of higher education institutions when enforcing these laws. Such sensitivity requires understanding of the special nature of higher education and we offer our assistance to the Department of Education to develop and provide any guidelines that the OCR staff deems necessary.

Finally, Mr. Chairman, with respect to the use of fund termination as a remedy, only financial assistance found to be supporting the discrimination may be terminated. The bill retains the requirement that a nexus be established between the discrimination found and any federal funding that is to be terminated or suspended by the administrative agency enforcing the law.

Eliminating discrimination on the basis of race, color, national origin, sex, handicap, or age is a national goal and cannot be accomplished by allowing pockets of prejudice to exist. Any institution that receives public funds -- either in the form of direct institutional aid or student aid -- should lead the way in setting the highest standards for equality. The Grove City decision weakens these standards and for that reason it should be overturned by Congress. AASCU stands ready to assist you to that end.

Thank you.

PREPARED STATEMENT OF SISTER RENEE OLIVER, O.S.U. ASSOCIATE DIRECTOR, CITIZENS FOR EDUCATIONAL FREEDOM

Thank you, gentlemen, for the opportunity to express my opinion on the proposed Civil Rights Act of 1984.

I am Sister Renee Oliver, Associate Director of Citizens for Educational Freedom, a non-partison, non-sectarian* organization representing parents and other groups concerned with parents' rights in education, especially with their right to choose the kind of education they want for their children.

Our objection to the new Civil Rights Act has nothing to do with civil rights, which we strongly support for others as diligently as we pursue it for ourselves. It does, however, have everything to do with what we perceive as overkill, similar to an attempt to kill a rogue elephant with a~~n~~ atom howitzer ~~bomb~~.

If the purpose of this legislation is to correct the decision of the Supreme Court in the Grove City College case so that Title IX of the Civil Rights Act of 1964 will apply to an entire college or university, then all that is necessary is that the language which has caused the confusion, namely "activities and programs" of a college be changed to read "the entire college or university". It would be a relatively simple matter.

But rather than deal directly with the problem at hand, this legislation redefines a "recipient" of Federal funds and it does so in such a broad way as to include just about everyone in the United States, from the independant truck driver who delivers federally subsidized milk to the local public school, to the owners of a "Mom and Pop" grocery store that accepts food stamps.

We know that it is not the intent of this legislation to be so all encompassing, but the words are there, and they would be pretty hard to argue down in a court of law, a place where more and more Americans are finding themselves these days.

As people who are already concerned about the continued encroachment of government into the everyday lives of its citizens, we are most concerned with the overkill of this piece of legislation. We therefore urge you to look at it not just with your civil rights eyes, but with your farsighted eyes that can see beyond the good that you wish to accomplish to what you are actually doing toward expanding the reach of this government for beyond what is needed, desired, or good for the civil rights of all our citizens.

Statement of
The Citizens Council on Women's Education
for
The Senate Labor and Human Resources Committee
in support of
The Civil Rights Act of 1984
May 16, 1984

The Citizens Council on Women's Education was established in September, 1982 as an independent project of the National Coalition for Women and Girls in Education. This volunteer council is composed of women and men of both political parties who have expertise in and demonstrated commitment to educational equity for women and girls. The Council is committed to assisting, monitoring and enhancing public programs which are designed to expand opportunities for women and girls at all levels of American education.

Since our founding, we have advised the Congress on appropriations for and the reauthorization of the Women's Educational Equity Act Program, and the twin goals of equality and quality in education. While these matters remain important, the Civil Rights Act of 1984 is the most significant piece of legislation of concern to the Council to be brought before the Congress since our founding.

In June of 1983 we submitted testimony to the House Budget Committee Task Force on Education and Employment for their hearings on education quality and federal policy. We wrote, "The position of the Justice Department in the forthcoming Supreme Court case of Grove City College vs. Bell may be crucial in determining whether Title IX remains the comprehensive statute which the Congress enacted." This past February, our fears were realized when the Court accepted the Justice Department's position and severely limited the scope and effectiveness of Title IX. Additionally, because of similar statutory language, three other significant civil rights laws may be similarly restricted.

Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 were passed by the Congress and signed by Presidents of both political parties because they recognized the compelling role of the federal government in eliminating the discrimination that racial and ethnic minorities, women, disabled and older Americans face throughout the course of their lives.

These laws have been successful in ending discrimination and in creating equal opportunities. These laws have been successful because they have been enforced as broad, comprehensive measures. The Court's Grove City College decision curtails these statutes' proven effectiveness.

The effects of the Grove City College decision are already being felt. The Washington Post reported in early March that the Deparment of Education rescinded a previous finding of discrimination against the University of Maryland's athletic department because that department received no direct federal funds. If this narrowing of Title IX is allowed to continue, the impressive gains of the past decade will quickly vanish. In the post-Grove City College era, women and girls have no recourse against discrimination if it occurs in areas which receive no direct federal funding; nor will educational institutions be required by law to eliminate sexual harassment and other subtle forms of discrimination in areas which do not receive federal funds directly. With the previous comprehensive coverage of Title IX, educational institutions had begun to seriously address these less visible, yet equally damaging, forms of discrimination.

The Congress now has the opportunity, and the obligation, to restore these civil rights statutes to their previous levels of effectiveness. Whether or not the Court was correct in its interpretation of Title IX is not the issue. The issue is whether or not the Congress, and the people of this nation, remain committed to eliminating discrimination. Throughout this debate, supporters will revive President Kennedy's statement that simple justice requires us to prevent public money from supporting discrimination wherever it occurs. Over the past twenty years we as a nation have been guided by this principle and have built an admirable record of eliminating discrimination and creating equal opportunities for all of our citizens.

The Congress must once again reaffirm its commitment to protecting all of our citizens from discrimination. We strongly support the Civil Rights Act of 1984 and we urge the members of this committee to guide this legislation to speedy passage.

LIBERTY THROUGH LAW

1787

CONSTITUTIONAL IMPACT STATEMENT

Constitutional Analyses
of Legislation
Pending Before the
House and Senate
Judiciary Committees.

The Civil Rights Act of 1984

S. 2568/H.R. 5490

The Center for Judicial Studies
632 Constitution Ave. N.E.
Washington, DC 20002

202-544-1776

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June 1, 1984

THE CIVIL RIGHTS ACT OF 1984

S. 2568/H.R. 5490

The Civil Rights Act of 1984, aptly described by Senator Robert Packwood (R.-Ore.) as "a simple bill with global ramifications,"[1] has been proposed as a corrective for one aspect of the Supreme Court decision in Grove City College v. Bell.[2] This statement will analyze briefly some implications of the proposed act with respect to federalism and other aspects of the constitutional system.

The Grove City Decision

Title IX of the Education Amendments of 1972[3] bars sex discrimination in "any education program or activity receiving Federal financial assistance." Grove City College, a private institution, has always refused federal and state financial assistance. Its students receive federal Basic

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[1] Cong. Rec., April 12, 1984, S4589.

[2] 104 S. Ct. 1211 (1984).

[3] 20 U.S.C. Sec. 1681(a).

Educational Opportunity Grants (BEOGs), which go directly to the students to pay tuition and other educational expenses. The Department of Education ruled that Grove City College itself was a "recipient" of "Federal financial assistance" and demanded that the College execute an Assurance of Compliance with Title IX's nondiscrimination provisions. The College denied that it was made a "recipient" by the fact that some of its students received BEOGs, and refused to sign the Assurance of Compliance.

The Supreme Court ruled, first, that the College was a "recipient" of "Federal financial assistance," despite the fact that "federal funds are granted to Grove City's students rather than directly to one of the College's educational programs."[4] The Court went on to decide, however, that the "education program or activity" of the College that was "receiving" federal assistance and that therefore was subject to Title IX, was not the College as a whole but only its financial-aid program.[5]

In holding that Title IX has only program-specific application, the Supreme Court rejected the contention that receipt of federal aid by any component of the college would bind every aspect of the college's activity by the Title IX prohibitions against sex discrimination. Instead, the receipt of BEOGs by its students requires the college to comply with Title IX only in the operation of its financial aid office; the rest of the college's activities are not bound by Title IX. The correctness of this interpretation is a matter of dispute.[6]

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[4] 104 S. Ct. at 1220.

[5] 104 S. Ct. at 1222.

Impact of Grove City on Age, Handicap and Race Discrimination

The key phrase, "program or activity," used in Title IX, is used also in the three main statutes banning discrimination on account of age, handicap, or race in federally aided programs.[7] Title IX, Section 504 and the Age Discrimination Act were all modeled in this respect on Title VI of the Civil Rights Act of 1964. The Grove City decision therefore raises the likelihood that the same kind of "program-specific" interpretation will be given to those other statutes as well as to Title IX. The judicial precedents appear to confirm this prospect[8]. It is important to remember, moreover, "that Title IX's coverage, even in broad form, applies only to educational entities or settings. Title VI, Section 504 and the Age Discrimination Act cover all federally-assisted entities and programs."[9] A program-specific interpretation of those statutes, therefore, would have an impact far beyond the area of education. Senator Kennedy expressed his concern that, after the Grove City decision, "the protection from discrimination provided by the government to the elderly, minorities and the disabled in all kinds of federally assisted activities is likely to be as spotty and inadequate as that offered to women and girls in education."[10]

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[6] Compare the testimony of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor, May 22, 1984, with the Statement of Senator Edward M. Kennedy (D.-Mass.), Cong. Rec. April 12, 1984, S4585.

[7] Those statutes are the Age Discrimination Act of 1975 (42 U.S.C. Sec. 6101, *et seq.*); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C., Sec. 794 *et seq.*); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000 d *et seq.*).

The Intent of the Sponsors of the Civil Rights Act of 1984

S. 2568 and its companion, H.R. 5490, were introduced, in Senator Kennedy's words, "to restore Title IX, Title VI, Section 504, and the ADA to their intended force and cover-

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8. See, for example, Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1980); see also Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984).

9. Testimony of Clarence M. Pendleton, Jr., Chairman of U.S. Commission on Civil Rights before House Committees on Judiciary and Education and Labor, May 16, 1984, p. 4.

10. Cong. Rec., April 12, 1984, S4586.

age."[11] "What difference does it make to a disabled student," asked Senator Robert Dole (R.-Kans.) in co-sponsoring S. 2685, "if the student financial aid office is in compliance with Section 504, if none of the school's academic programs are accessible?"[12] The bill makes three changes in all four laws:

> 1. The "general prohibition language in each statute is modified to delete 'program or activity' and generally to substitute the term 'recipient.' Thus, each of the four laws would prohibit discrimination 'by a recipient of' - rather than 'under a program or activity receiving' - 'Federal financial assistance.' In Title IX, the limitation to education is retained; that is, the prohibition would run against an 'education recipient' in place of an 'education program or activity.'"[13]
>
> 2. A definition of the term "recipient" is added to each of the four statutes, as will be discussed below.
>
> 3. The enforcement section of each of the laws is modified so as to enlarge the power of the agencies to terminate funding, as will be discussed below.

Senator Packwood summarized the changes as follows: "That any receipt of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that only the particular assistance supporting noncompliance will be subject to termination."[14] Senator Robert Dole (R.-Kans.), in co-sponsoring S. 2568, stressed that the bill was intended as a limited remedial measure: "I believe it should be emphasized that the sole purpose of this legislation is to restore Title IX to the broad coverage which marked its enforcement prior to Grove City, and to keep the other three civil rights laws intact. It is not the intent of the sponsors to break new ground."[15]

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[11] Cong. Rec. April 12, 1984, S4586.

[12] Cong. Rec. April 12, 1984, S4590.

[13] Statement by Senator Alan Cranston, Cong. Rec., April 12, 1984, S4594.

There is reason to believe, however, that the limited expectations of the sponsors of S. 2568 are unrealistic. This analysis will examine the likely effects of the bill in two general respects: its use of the expansive term "recipient" and its increase of the enforcement power of the agencies.

The Meaning and Effect of "Recipient"

The four statutes amended by S. 2568 now cover "any program or activity receiving federal financial assistance." [References herein will be to S. 2568 rather than to its companion, H.R. 5490] S. 2568 would amend those statutes to cover any "recipient" ("education recipient" in Title IX) of such assistance. In all four statutes, incidentally, "tax exemptions and deductions would continue to be excluded from the definition of Federal financial assistance."[16] The term "recipient" is defined in S. 2568 as follows:

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[14] Cong. Rec., April 12, 1984, S4589.

[15] Cong. Rec., April 12, 1984, S4590.

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."[17]

Assistant Attorney General Reynolds maintains, contrary to the claim of the sponsors of S. 2568, that the definition of "recipient" in S. 2568 exceeds the definition of that term in the existing regulations under Title VI, Title IX and Section 504, in that "a recipient, as used in the existing regulatory scheme, is subject to coverage only as to its funded programs or activities; by contrast, under

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[16] Statement of Senator Robert Dole (R.-Kans.), Cong. Rec., April 12, 1984, S4590.

[17] Sec. 2(b)(2).

[S. 2568], a recipient is to be covered in its entirety."[18] In any event, it is clear that, under S. 2568, "when an entity receives federal aid for one of its parts or subdivisions, the entity - and not the specific subunit of the entity - is the recipient."[19] Senator Cranston made this plain in his explanation of S. 2568:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[20]

If federal aid is extended, not to the entity as a whole but directly to one of its subunits, the entity as a whole (and consequently all other subunits) will be covered if the entity itself "receives support" from the aided subunit. As Senator Cranston explained, "Where Federal financial assistance is extended to a subunit of an entity, the question whether the entity itself and all of the other subunits of the entity would be covered would turn on the question of whether the entity "receives support" from the provision of the assistance to the subunit - for example, by receiving a portion of the assistance to help defray overhead costs. If the entity receives such support, it and all of its subunits are subject to the anti-discrimination ban, just as they would be if the entity itself received assistance directly from a Federal agency or through a third party."[21]

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[18] Reynolds testimony, supra.

[19] Statement of Senator Edward M. Kennedy, Cong. Rec., April 12, 1984, S4586.

[20] Cong. Rec., April 12, 1984, S4594.

S. 2568 contains no definition of the terms, "receives support," "entity" and "subunit," among other undefined terms. As Senator Alan Cranston (D.-Cal.) explained, "the concept of 'support' is intended to refer to a not immaterial support having monetary value which could include, for example, services."[22]

On the one hand, aid to a State government would bring all the counties, cities, villages, school districts, etc., in that state automatically within the coverage of the age, sex, handicap and race discrimination statutes and regulations. For example, if the state receives a categorical grant for its highway department, then, if the state itself is the "recipient," all activities of the state government, including the prison system and state professional licensing boards, would become subject to the civil rights laws, which incidentally, are administered under regulations using an "effects" test, as will be discussed below. The same conclusion would follow under block grants as well. These results are automatic. On the other hand, if federal aid is given to one of the "subunits" of the State, e.g., a water district or school district, then the State as a whole is covered in all its activities and subdivisions so long as it "receives support from the extension of Federal financial assistance" to that subunit. Similarly, federal aid given to one department or campus of a university could subject every activity of the university to federal regulations regarding age, handicap, sex and race discrimination. If a university engages in non-educational, commercial activities, those activities could be covered by all four acts if aid were given to any part of the university.

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[21] Cong. Rec., April 12, 1984, S4595.

[22] Cong. Rec., April 12, 1984, S4595.

As a practical matter, all states already receive federal aid given directly to themselves or through their subdivisions. The likely result of the enactment of S. 2568 therefore would seem to be an immediate extension of federal regulatory power with regard to age, sex, handicap and race discrimination, to virtually all the activities of every state and political subdivision in the land. Similar conclusions would follow in the private sector with respect to aid extended to subsidiaries and affiliates of corporations as well as to the corporations themselves.

Title IX now applies to "any education program or activity receiving Federal assistance." Under S. 2568, Title IX and the regulations adopted to enforce it would apply to any educational program incidentally conducted by a non-educational institution if that non-educational institution received federal assistance for any purpose even if it received no assistance directed toward its educational program. Senator Kennedy illustrated this by the following example: "A state prison receives federal funding to develop a better inmate classification system, and no other federal assistance. Its education activities and related benefits, such as classes and training programs, are covered by Title IX. The entire prison - including its educational programs - would be covered by Title VI, Section 504, and the ADA, because it is a recipient of federal funding and these statutes are not limited to education."[23]

This result would apply as well to training and other educational programs conducted by a corporation which receives any federal assistance, including, perhaps, as will be discussed below, its receipt of food stamps from "a person." Furthermore, since S. 2568 defines a "recipient" as a "transferee of any . . . entity . . . to which Federal financial assistance is extended (directly or through another entity or a person)," and since "transferee" is nowhere defined in the bill, one can only speculate as to the ultimate potential reach of S. 2568 coverage.

These conclusions become even more striking in light of the Grove City definition of aid to the person as aid to the institution. If one student at a single campus of a state university system used a BEOG, the entire university could be covered by all four acts. The apartment building owned elsewhere by that university and rented to the general public could be required to install ramps for the handicapped, etc. The Grove City decision attempted to forestall the further extension of this principle by stating, "Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX . . . ."[24] But S. 2568, if enacted, would manifest precisely that intent. A "recipient" includes any of the listed types of entities "to which Federal financial assistance is extended (directly or through another entity or a person)." Although S. 2568 does not include a "person" as a "recipient," an entity from among the listed types would become a "recipient" if it received federal assistance "through . . . a person." So why would S. 2568 not apply all four acts to the grocer who took food stamps?

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[23] Cong. Rec., April 12, 1984, S4586.

Senator Cranston did emphasize that nothing in S. 2568 is intended "to change the consistent interpretation" of the four statutes "excluding from coverage as 'recipients' individuals and businesses which may ultimately receive federally provided dollars - such as a clothing store from whom a retiree purchases a suit with a social security check or a landlord whose tenant pays the rent with funds from supplemental security income payments, and others similarly situated - as well as the individual beneficiaries - the social security and SSI recipients themselves - of such programs."[25] While it is true that the individual retiree is not a "recipient" under S. 2568, the plain language of the bill includes the grocery or clothing store to which he negotiates his Social Security check. "Thus, the bill could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations. Pharmacies and drug stores that participate in medicare/medicaid programs could also be "recipients," as could the "transferee" of an individual's social security check who, upon acceptance of such payment, would have (albeit unwittingly) signed an open invitation to federal enforcers to enter and investigate."[26]

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[24] 104 S. Ct. at 1217-18, n. 13.

S. 2568 is given a further reach by the Supreme Court's 1983 interpretation of Title VI in Guardians Assn. v. Civil

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[25] Cong. Rec., April 12, 1984, S4595.

[26] Testimony of William Bradford Reynolds, supra; see also Prof. Chester E. Finn, Jr., Civil Rights in Newspeak, Wall St. Journal, May 23, 1984.

Service Commission of the City of New York.[27] The Court held that although discriminatory intent is necessary to show a violation of Title VI itself, nevertheless, proof of "discriminatory effect" will suffice to create liability for a violation of the regulations issued under Title VI rather than of Title VI itself.[28] Under Grove City, regulations outlawing conduct which has an unintended racially discriminatory effect are limited in their impact to the programs or activities that receive federal assistance. Under S. 2568, however, a requirement of affirmative action on racial discrimination could apply to all recipients as expansively defined in that bill.

The Expanded Agency Enforcement Power Under S. 2568

Serious implications are raised by S. 2568's expansion of the enforcement power of administrative agencies. Under S. 2568, in the words of Senator Cranston, "all of the existing procedural safeguards that the four laws provide for before Federal funds may be terminated are retained without change - the government's initial duty to attempt resolution of the violation through conciliation, notice to the recipient of any adverse finding, opportunity for hearing, 30 days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and the right to judicial review of any decision to terminate funding."[29]

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[27] 103 S. Ct. 3221 (1983).

[28] See 103 S. Ct. at 3235, n. 1 (separate opinion of Powell, J., Burger, C. J. and Rehnquist, J.).

According to the existing law, however, the power of the agencies to terminate funding is program-specific, i.e., the termination is limited to funding for the particular program or activity which is found to be in noncompliance.[30] S. 2568, by contrast, would permit the enforcing agency to terminate any "assistance which supports"[31] the noncompliance. In this respect, S. 2568 would open the door to termination of funding to an innocent program if that program "supports" another program that is in noncompliance. And it would seem clear that if a program is in noncompliance, assistance to the parent entity may be cut off on the theory that assistance to the whole provides support to the discrimination by the part.

At this point it will be useful to compare the parameters of S. 2568 with respect to basic coverage, on the one hand, and fund termination on the other. Senator Cranston explained his view of this as follows:

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[29] Cong. Rec., April 12, 1984, S4595.

[30] See North Haven Board of Education v. Bell, 456 U.S. 512 (1982); Board of Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir., 1969); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248 (1984); see also testimony of Clarence M. Pendleton, Jr. Chairman, U.S. Commission on Civil Rights, before House Committees on Judiciary and Education and Labor, May 16, 1984.

[31] See Sec. 2(c)(2)(C).

> Thus, in place of the "program-specific" coverage improperly imposed by the Supreme Court, coverage of all components of the recipient would be restored.
>
> "This broad construction of the entity covered by the nondiscrimination laws would apply to such areas as executing assurances of compliance, investigation of charges, and private rights of action and judicial actions by the United States to obtain injunctive or declaratory relief to bring about compliance.
>
> "With respect to the power to terminate funds or refuse to grant funds, the statutory scheme would be different. It would retain the basic concept of "pinpointing"; that is, limiting the termination of funds to those funds which have a specific nexus to the discrimination that is found."[32]

Senator Cranston's distinction is precarious, however, in light of the language of S. 2568 which would appear to make the power of fund termination practically as broad as the extremely broad definition of "recipient." As Senator Cranston himself stated:

> I would note that in our proposal, both the definition of recipient and the pinpointing provision use similar terms with respect to receiving "support" and assistance which "supports". In the former case, an entire organization, institution, or other entity meets the definition of "recipient" if Federal assistance directly to a subunit results in the parent entity also receiving some appreciable "support." In the case of pinpointing, only assistance that "supports" noncompliance may be cutoff. In both situa-

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[32] Cong. Rec., April 12, 1984, S4595.

> tions, the concept of "support" is intended to refer to a not immaterial support having monetary value which could include, for example, services.[33]

In light of the indefiniteness of "supports," which is not defined in S. 2568, it would seem clear that the "specific nexus to the discrimination" which Senator Cranston says is required for termination of funding, is a less than exacting restraint on the discretion of the agencies with respect to fund termination. This expanded potential for termination of funding is significant despite the fact that termination "has been actually used in only a handful of cases through the history of these laws."[34] The mere prospect of termination is a powerful inducement to compliance with federal agency directives. That inducement will be significantly increased by the grant of authority to the agency to cut off not only the funds of the program or activity that actually discriminates but also the funds of any entity or part thereof that directly or indirectly "supports" the discrimination.

Other aspects of S. 2568 would merit discussion here were it not for the limitations of space. For example, it is not at all unrealistic to describe S. 2568 as a "back door Equal Rights Amendment," in that the virtually universal character of various types of federal aid to education, combined with the "effects" test which could outlaw even unintentional discrimination, could endow federal agencies with the power to impose upon education recipients, by administrative action, many, if not most, of the requirements that would have been imposed upon them by the Equal Rights Amendment itself.

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[33] Cong. Rec., April 12, 1984, S4595.

[34] Statement of Senator Robert Dole (R.-Kans.), Cong. Rec. April 12, 1984, S4590.

Another issue is presented by the fact that S. 2568 retains the private right of action which exists under the four statutes and it continues the provision for attorneys' fees in such actions.[35] In view of the expansion of coverage under S. 2568 and the "effects" test which can forbid even unintentional discrimination, the inducement to litigiousness here is apparent. A further problem with S. 2568 arises from the fact that each agency administering the four statutes would have the responsibility to regulate all the activities of entities receiving federal assistance. This raises the prospect of added paper work, interagency conflicts, multiplicity of complaints, duplication of effort and involvement by agencies in areas in which they have neither expertise nor experience. Nor does S. 2568 provide for interagency referrals to alleviate this problem. Another potential problem is created by the exposure of federal administrators to an increased risk of personal liability through their failure to enforce the four statutes affected by S. 2568, especially in light of the expanded definition of recipients and the employment of the "effects" test for discrimination at least in the race area.[36]

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[35] See Consolidated Rail Corporation v. Darrone, 104 S. Ct. 1248 (1984).

The overall effect of S. 2568 on the present enforcement mechanism under the four statutes was generally summarized by Dr. Michael Horowitz, General Counsel of the Office of Management and Budget:

> Currently, limitation of coverage to programs and activities receiving Federal assistance serves as a "regulatory breakpoint", restricting burdens and liability to those programs and activities in which the Federal government has some financial interest; and by limiting review and investigatory authority over Federally assisted programs and activities to agencies with expertise in them. And the current "pinpoint provision", by providing definite limits to the scope of any penalties which agencies might impose, has had a similar moderating effect. S. 2568 would remove these "breakpoints", while at the same time retaining all current judicial interpretations and agency practices under the referenced acts. As a result, standards such as the "effects test" would become applicable to all of a recipient's programs and activities, not just those receiving Federal funds.[37]

Some Constitutional Implications of S. 2568

The foregoing analysis should make it apparent that S. 2568 may be criticized as vague and uncertain, for example, in its failure to define important terms such as "receives support," "entity," "submit," "assistance which supports" and others. While it is important that Congress avoid what the Supreme Court has called "the shoals of unconstitutional vagueness,"[38] and while "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds,"[39] it is likely that the lack of precision in S. 2568 could be remedied by the regulations issued to enforce it, which regulations can impose obligations beyond those specifically imposed by the statute itself.[40] The imprecision of S. 2568, therefore, would argue strongly in favor of clarifying amendments before its enactment but it would not justify a prediction that, without such amendments, S. 2568 as implemented would be held unconstitutional for vagueness.

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[36] See National Black Police Assn. v. Velde, 712 F.2d 569 (D.C. Cir., 1983), cert. den., 52 U.S.L.W. 3791 (April 16, 1984).

[37] Michael Horowitz, Memorandum, Analysis of S. 2568: The Civil Rights Act of 1984.

Another constitutional question is raised by the expansion of federal regulatory power that would be effected by S. 2568. Private entities as well as state and local governments would be subject to pervasive regulation with respect to age, handicap, race and sex discrimination, on

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38. Buckley v. Valeo, 424 U.S. 1, 78 (1976).

39. Pennhurst State School v. Halderman, 451 U.S. 1, 24 (1981).

40. See Guardians Assn. v. Civil Service Commission of the City of New York, 103 S. Ct. 3221 (1983).

account of the expansive definition of "recipient" in S. 2568, its expansion of agency enforcement power and the virtual universality of federal aid. These regulatory exposures could be burdensome. However, "Congress may fix the terms on which it shall disburse federal money to the States"[41] and, with respect to private recipients, "[i]t is hardly lack of due process for the Government to regulate that which it subsidizes."[42] While the regulations sanctioned by S. 2568 would be more extensive and more intrusive than those already in place, they would appear to differ more in degree than in kind from those heretofore approved by the courts.[43]

The point of these observations is not to endorse the increase that S. 2568 would effect in federal regulation of the private lives of Americans, but to suggest merely that it is unlikely that the Supreme Court will find S. 2568 unconstitutional on that account. The decision would seem to be for the Congress rather than for the courts.

A more difficult question is posed by the impact of

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41. Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

42. Wickard v. Filburn, 317 U.S. 11, 131 (1942).

43. See, for example, Detroit Police Assn. v. Young, 608 F.2d 671 (6th Cir., 1979); United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977); EEOC v. Wyoming, 103 S. Ct. 1054 (1983); Assn. for Retarded Citizens v. Olson, 561 F. Supp. 473 (D, N.D., 1982); La Strange v. Consolidated Rail Corp., 687 F.2d 767 (3rd Cir., 1982).

S. 2568 on state governments themselves. If S. 2568 were enacted in its present form, it would instantly subject virtually every operation of every state and local government in the land to the potential supervision of federal agencies with respect to age, handicap, race and sex discrimination, including unintentionally discriminatory conduct that has discriminatory effects, with the attendant potential for affirmative action requirements. Such a massive preemption of state authority would seem to be contrary to the spirit, if not the letter, of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Tenth Amendment was long regarded as a mere "truism," reciting the obvious fact that all powers not delegated are reserved.[44] In 1976, surprisingly, the Supreme Court declared an Act of Congress unconstitutional on the basis of Tenth Amendment principles.[45] Usery held unconstitutional the 1974 amendments to the Fair Labor Standards Act, which extended the wage and hour provisions of the Act to virtually all public employees. The Supreme Court declared that to the extent that the act overrode "the State's freedom to structure integral operations in areas of traditional governmental functions," such as fire, police, sanitation, public health and parks and recreation, the Act was "not within the authority granted Congress by the commerce clause."[46] The *Usery* decision, however, has been severely limited by later Supreme Court rulings.[47] In any event, the Court in *Usery* specifically noted that it was not deciding whether the Tenth Amendment was a limit on Congress' spending power, its power to enforce the Fourteenth Amendment or its war power.[48] And in *Bell v. New Jersey*,[49] the Court held that the states are bound by regulations attached to a federal grant voluntarily accepted by the states. The Court rejected the claim that the restrictions violated the Tenth Amendment:

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[44] See U.S. v. Darby, 312 U.S. 100, 124 (1941).

[45] National League of Cities v. Usery, 426 U.S. 833 (1976).

> Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The

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[46] 426 U.S. at 852.

[47] See *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264 (1981); *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982).

[48] 426 U.S. at 852, n. 17; 426 U.S. at 854, n. 18; see *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532, 536, n. 10 (E.D., N.C., 1977), *aff'd mem.*, 435 U.S. 962 (1978); see generally, Rotunda, *Usery in the Wake of Federal Energy Regulatory Commission v. Mississippi*, 1 Constitutional Commentary 43 (1984).

[49] 103 S. Ct. 2187 (1983).

> State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I.[50]

The potential displacement of State authority and private autonomy by S. 2568 is so extensive as to justify Dr. Michael Horowitz's conclusion that, "buttressed by the legislative history created to date, the bill if passed would largely eliminate the remaining distinctions between Federal and State, and Federal and private, concerns."[51] Nevertheless, there is no sufficient basis to expect that S. 2568, if enacted and implemented by appropriate regulations, would fail to survive a constitutional challenge in court. The decision of the Congress on S. 2568, therefore, is likely to be conclusive.

It should be mentioned here that alternatives are available which would achieve the limited objective of overturning the challenged aspect of the Grove City case without inviting the difficulties involved in S. 2568.[52]

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[50] 103 S. Ct. at 2197.

[51] Horowitz, Memorandum, *supra*.

[52] See, for example, Senator Packwood's simple proposal (S. 2363) to amend Title IX "by striking out 'education program or activity,' and inserting in lieu thereof "education program, activity or institution.'" More extensive coverage would be provided by Dr. Horowitz' proposal "to amend Title IX to prohibit discrimination based on race, color, national origin, age or handicap as well as sex and to provide that any assistance to an educational institution would result in coverage of all of its education programs." (Horowitz, Memorandum, *supra*).

If a limited alternative is not substituted for S. 2568, and if that measure is enacted in its present form, it will effect a radical and massive expansion of federal power in the subject areas.

Charles E. Rice
Visiting Scholar
Center for Judicial Studies
June 1, 1984

PREPARED STATEMENT OF ROY C. JONES, DIRECTOR, LEGISLATIVE AFFAIRS, MORAL MAJORITY, INC.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS ROY JONES. I AM THE DIRECTOR OF LEGISLATIVE AFFAIRS FOR MORAL MAJORITY, INC., IN WASHINGTON, D.C. OUR ORGANIZATION WAS FOUNDED IN 1979 BY REV. JERRY FALWELL. TODAY WE REPRESENT OVER 80,000 MINISTERS, PRIESTS AND RABBIS, AS WELL AS MILLIONS OF MORAL MAJORITY MEMBERS NATIONWIDE.

MR. CHAIRMAN, IT IS WITH GREAT PLEASURE AND APPRECIATION THAT I EXPRESS OUR SUPPORT FOR THE CIVIL RIGHTS OF ALL AMERICANS. HOWEVER, I WOULD LIKE TO POINT OUT THAT "YOU CAN'T TELL A BOOK BY ITS COVER." AND YOU CAN'T ALWAYS TELL A LAW BY ITS TITLE.

MORAL MAJORITY YIELDS TO NONE IN ITS COMMITMENT TO THE PROPOSITION THAT THE CIVIL RIGHTS OF ALL MUST BE PROTECTED BY LAW AGAINST UNJUSTIFIED ABRIDGEMENT ON THE GROUNDS, AMONG OTHERS, OF RACE, RELIGION, SEX, AGE OR HANDICAP. HOWEVER, MERELY CALLING A BILL A "CIVIL RIGHTS ACT" WILL NOT NECESSARILY MAKE IT SO. THE PROPOSED CIVIL RIGHTS ACT OF 1984, ILLUSTRATES THIS POINT.

THE BILL[1] IS CLAIMED BY ITS SPONSORS TO BE A MODEST CORRECTIVE FOR ONE ASPECT OF THE SUPREME COURT'S DECISION IN GROVE CITY COLLEGE V. BELL.[2] "IT IS NOT THE INTENT OF THE SPONSORS," SAID SENATOR ROBERT DOLE, "TO BREAK NEW GROUND." IN FACT, HOWEVER, THE BILL WOULD OBLITERATE IN ITS COVERED AREAS THE CONSTITUTIONAL ALLOCATION OF POWERS BETWEEN THE FEDERAL GOVERNMENT, ON THE ONE HAND AND STATE AND LOCAL GOVERNMENTS ON THE OTHER. IT WOULD

FURTHER OBLITERATE THE CONSTITUTIONAL DISTINCTION BETWEEN THE GOVERNMENTAL AND PRIVATE SPHERES BY CONFERRING AN INSTANT AUTHORITY ON FEDERAL AGENCIES TO REGULATE THE PRACTICES OF VIRTUALLY ALL MAJOR PRIVATE ENTITIES IN THE SUBJECT AREA. THESE PROSPECTS ARE OMINOUS AND CAUSE ENOUGH IN THEMSELVES FOR THE REJECTION OF S. 2568.

THERE IS, HOWEVER, ANOTHER ASPECT OF THIS BILL WHICH IS OF EVEN MORE URGENT CONCERN TO ME AND THOSE WHOM I REPRESENT. THAT ASPECT IS THE DEVASTATING IMPACT THE BILL WOULD HAVE ON THE INDEPENDENCE OF CHURCH-RELATED AND OTHER PRIVATE SCHOOLS AND ON CHURCHES IN GENERAL.

S. 2568 ACCEPTS THE FIRST RULING OF THE SUPREME COURT IN GROVE CITY, THAT THE SCHOOL WAS A "RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE," DESPITE THE FACT THAT "FEDERAL FUNDS ARE GRANTED TO GROVE CITY'S STUDENTS RATHER THAN DIRECTLY TO ONE OF THE COLLEGE'S EDUCATIONAL PROGRAMS."[3] IT PURPORTS, HOWEVER, TO OVERRULE THE SECOND RULING IN GROVE CITY, THAT THE "EDUCATION PROGRAM OR ACTIVITY" OF THE COLLEGE THAT WAS "RECEIVING" FEDERAL ASSISTANCE AND THAT THEREFORE WAS SUBJECT TO TITLE IX, WAS NOT THE COLLEGE AS A WHOLE BUT ONLY ITS FINANCIAL-AID PROGRAM.[4] THE RESULTANT OF THE BILL'S ACCEPTANCE OF THE FIRST RULING IN GROVE CITY AND ITS REJECTION OF THE SECOND CAN BE SEEN IN ITS NEW AND ALL-EMBRACING DEFINITION OF A "RECIPIENT" OF FEDERAL FINANCIAL ASSISTANCE:

> "(A) any State or political subdivision thereof, or any instrumentality of a State thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality,

> agency, institution, organization or entity), and "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."5

S. 2568 WOULD APPLY THIS EXPANSIVE DEFINITION OF RECIPIENT NOT ONLY TO TITLE IX, WHICH PROHIBITS SEX DISCRIMINATION IN FEDERALLY AIDED EDUCATION PROGRAMS, BUT ALSO TO THE AGE DISCRIMINATION ACT OF 1975, SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED IN 1978, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, WHICH STATUTES PROHIBIT DISCRIMINATION ON GROUNDS OF AGE, HANDICAP OR RACE IN ANY FEDERALLY AIDED PROGRAM. ALTHOUGH TITLE IX'S COVERAGE, EVEN IN BROAD FORM, APPLIES ONLY TO EDUCATIONAL ENTITIES OR SETTINGS, TITLE VI, SECTION 504 AND THE AGE DISCRIMINATION ACT COVER ALL FEDERALLY-ASSISTED ENTITIES AND PROGRAMS."[6] EVERY SUCH PROGRAM, THEREFORE, WOULD BE AFFECTED BY THE NEW DEFINITION CONTAINED IN S. 2568.

THE FOCUS OF MY REMARKS IS THE IMPACT OF S. 2568 ON EDUCATION. CONSIDER, FOR EXAMPLE, LIBERTY BAPTIST COLLEGE, THE STUDENTS OF WHICH RECEIVE FOUR STUDENT-RELATED TYPES OF FEDERAL AID:

1. BASIC EDUCATIONAL OPPORTUNITY GRANTS (PELL GRANTS)
2. GUARANTEED STUDENT LOANS
3. WORK-STUDY
4. SUPPLEMENTAL EDUCATION OPPORTUNITY GRANTS

IT WOULD SEEM CLEAR THAT, UNDER THE FIRST HOLDING OF GROVE CITY, EACH OF THESE STUDENT AID PROGRAMS WOULD CONSTITUTE AID TO LIBERTY BAPTIST COLLEGE. S. 2568 WOULD SUBJECT EVERY ASPECT

OF THE COLLEGE'S ACTIVITIES TO THE FEDERAL REGULATIONS APPLICABLE TO AGE, HANDICAP AND RACE AS WELL AS SEX DISCRIMINATION.

LIBERTY BAPTIST COLLEGE DOES NOT ENGAGE IN OR CONDONE DISCRIMINATION IN ANY OF THESE AREAS. HOWEVER, THE FEDERAL REGULATIONS IN THESE MATTERS ARE NOT CONCERNED MERELY WITH THE PREVENTION OF INTENTIONAL DISCRIMINATION. RATHER, THE COURTS HAVE UPHELD THE POWERS OF THE REGULATORS TO GO EVEN BEYOND THE STATUTORY LANGUAGE SO AS TO FORBID CONDUCT WHICH MERELY HAS A "DISCRIMINATORY EFFECT."[7] LIBERTY BAPTIST COLLEGE, UPON THE ENACTMENT OF S. 2568, WOULD BE SUBJECT NOT ONLY TO WHATEVER AFFIRMATIVE ACTION PEQUIREMENTS MIGHT BE PROMULGATED BY THE AGENCIES IN EACH OF THESE AREAS, BUT ALSO TO THE INCREASED AND VARIED RECORD-KEEPING AND REPORTING REQUIREMENTS OF SEPARATE AGENCIES CHARGED WITH THE ENFORCEMENT OF FOUR DISTINCT STATUTES. AND ALL THIS WOULD OCCUR THROUGH THE MERE RECEIPT BY LIBERTY BAPTIST STUDENTS OF FEDERAL ASSISTANCE.

IF S. 2568 IS ENACTED, PRIVATE COLLEGES WILL HAVE TWO ALTERNATIVES:

1. REFUSE TO ADMIT STUDENTS WHO RECEIVE FEDERAL STUDENT AID, ASSUMING, OF COURSE, SUCH STUDENTS CAN BE RELIABLY IDENTIFIED IN ADVANCE;
2. ADMIT THOSE STUDENTS AND SUBUNIT TO THE FULL RANGE OF FEDERAL REGULATION ENVISIONED BY S. 2568, A COURSE WHICH WOULD SOUND THE DEATH KNELL OF THOSE SCHOOLS AS AUTHENTICALLY PRIVATE INSTITUTIONS.

THE PROBLEM HERE IS ESPECIALLY ACUTE FOR RELIGIOUS COLLEGES. TITLE IX PROVIDES AN EXEMPTION FOR "AN EDUCATIONAL INSTITUTION

WHICH IS CONTROLLED BY A RELIGIOUS ORGANIZATION IF THE APPLICATION OF [TITLE IX] WOULD NOT BE CONSISTENT WITH THE RELIGIOUS TENETS OF SUCH ORGANIZATION."[8] THE REGULATION IMPLEMENTING THIS PROVISION STATES THAT "[A]N EDUCATIONAL INSTITUTION WHICH WISHED TO CLAIM THE EXEMPTION...SHALL DO SO BY SUBMITTING IN WRITING TO THE ASSISTANT SECRETARY A STATEMENT BY THE HIGHEST RANKING OFFICIAL OF THE INSTITUTION, IDENTIFYING THE PROVISIONS OF THIS PART WHICH CONFLICT WITH A SPECIFIC TENET OF THE RELIGIOUS ORGANIZATION."[9]

APART FROM THE FACT THAT MANY, IF NOT MOST COLLEGES OF A RELIGIOUS ORIENTATION ARE NOT LEGALLY "CONTROLLED BY A RELIGIOUS ORGANIZATION," THIS REGULATION REQUIRES THAT THE COLLEGE ASSUME THE BURDEN OF PROVING THAT THE LAW OR REGULATION IN QUESTION VIOLATES A "SPECIFIC TENET OF THE RELIGIOUS ORGANIZATION." AND IT ENDOWS THE ASSISTANT SECRETARY OF EDUCATION WITH THE POWER TO PERFORM THE THEOLOGICAL TASK OF JUDGING THE MEANING OF RELIGIOUS DOCTRINE. THIS SITUATION HAS IMPORTANT IMPLICATIONS WITH RESPECT TO SUCH ISSUES AS THE INSTITUTION'S TREATMENT OF ACTIVE HOMOSEXUALS,[10] ITS POLICIES WITH RESPECT TO CAREER AND OTHER COUNSELLING OF TWO SEXES,[11] AND ITS TREATMENT OF ABORTION.[12]

UNDER S. 2568, IF A CHURCH-RELATED OR OTHER PRIVATE SCHOOL, OR EVEN A CHURCH ITSELF, RECEIVED ANY FEDERAL AID "DIRECTLY OR THROUGH ANOTHER ENTITY OR A PERSON," EVERY ACTIVITY OF THAT SCHOOL OR CHURCH OR OF ANY OF ITS SUBUNITS WOULD BE COVERED BY THE FOUR STATUTES AFFECTED. AS SENATOR ALAN CRANSTON EXPLAINED:

> Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party, the whole entity and all of its component parts would be covered by the anti-

> discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components and to recover damages for injuries suffered by reason of discrimination in any component.[13]

AND IF ANY FEDERAL AID WERE PROVIDED DIRECTLY TO ONE OF THE SUBUNITS, RATHER THAN DIRECTLY TO THE EMTITY ITSELF, THE ENTITY AS A WHOLE (AND THEREFORE ALL OF ITS SUBUNITS) WOULD BE COVERED BY THE FOUR STATUTES IF THE ENTITY "RECEIVES SUPPORT" FROM THE SUBUNIT WHICH RECEIVES THE AID. MOREOVER, THE AGENCIES WOULD HAVE THE POWER TO TERMINATE ANY "ASSISTANCE WHICH SUPPORTS"[14] THE NONCOMPLIANCE BY THE ENTITY OR ANY SUBUNIT WITH THAT AGENCY'S REGULATIONS.

IN VIEW OF THE BROAD COOPERATION OF CHURCHES AND THE FEDERAL GOVERNMENT IN THE SOCIAL WELFARE FIELD, IT IS PLAIN TO SEE THAT MOST CHURCHES WOULD IMMEDIATELY QUALIFY AS "RECIPIENTS" UNDER S. 2568 AND THAT THEREFORE VIRTUALLY ALL THEIR ACTIVITIES WOULD HAVE TO ASSUME THE REGULATORY BURDEN OF COMPLYING WITH EACH OF THE FOUR STATUTES AND THEIR ACCOMPANYING REGULATIONS. SIMILAR CONCLUSIONS APPLY TO BUSINESS AND CHARITABLE CORPORATIONS, AND CIVIC ORGANIZATIONS SUCH AS THE MORAL MAJORITY.

IF A CHURCH RECEIVES A FEDERAL GRANT FOR A HOUSING ASSISTANCE PROGRAM, FOR EXAMPLE, THE SCHOOLS OPERATED BY THE CHURCH WOULD BE COVERED. IF ONE STUDENT IN ONE DEPARTMENT OF A UNIVERSITY USED A PELL GRANT, THE ENTIRE UNIVERSITY WOULD BE COVERED AS TO ALL ITS ACTIVITIES, EVEN THOSE WHICH ARE NON-EDUCATIONAL. THE UNIVERSITY COULD BE REQUIRED, FOR INSTANCE, TO INSTALL HANDICAP RAMPS ON ITS SEPARATELY OPERATED HOUSING DEVELOPMENT, EVEN IF NO HANDICAPPED PERSONS WANTED TO LIVE THERE. THE NET RESULT WOULD BE NOT AN INCREASE IN CIVIL RIGHTS BUT AN INCREASE

IN RENT.

ALSO, "THE BILL COULD BE CONSTRUED SO THAT FEDERAL FOOD STAMP PROGRAMS WOULD SUBJECT PARTICIPATING SUPERMARKETS AND LOCAL GROCERY STORES TO FEDERAL CIVIL RIGHTS COMPLIANCE REVIEWS AND COMPLAINT INVESTIGATIONS. PHARMACIES AND DRUG STORES THAT PARTICIPATE IN MEDICARE/MEDICAID PROGRAMS COULD ALSO BE "RECIPIENTS," AS COULD THE "TRANSFEREE" OF AN INDIVIDUALS SOCIAL SECURITY CHECK WHO, UPON ACCEPTANCE OF SUCH PAYMENT, WOULD HAVE (ALBEIT UNWITTINGLY) SIGNED AN OPEN INVITATION TO FEDERAL ENFORCERS TO ENTER AND INVESTIGATE."[15]

A MAJOR PROBLEM WITH S. 2568 IS ITS LACK OF PRECISION. IT FAILS TO DEFINE SOME OF ITS MOST IMPORTANT TERMS, SUCH AS "RECEIVES SUPPORT," "ENTITY," "SUBMIT," "ASSISTANCE WHICH SUPPORTS" AND OTHERS. WHILE IT IS THE INTENT OF THE SPONSORS THAT "TAX EXEMPTIONS AND DEDUCTIONS WOULD CONTINUE TO BE EXCLUDED FROM THE DEFINITION OF FEDERAL FINANCIAL ASSISTANCE,"[16] S. 2568 MUST BE READ IN THE CONTEXT OF THE HOLDINGS IN _REGAN V. TAXATION WITH REPRESENTATION_[17] AND _BOB JONES UNIVERSITY V. U.S._,[18] THAT A TAX EXEMPTION IS A SUBSIDY. WHILE S. 2568 DOES NOT INCLUDE TAX EXEMPTIONS AND DEDUCTIONS AS SUBSIDIES, IT DOES NOT FORBID THEIR EXCLUSION. IN LIGHT OF THE SUPREME COURT'S APPARENT POSITION THAT REGULATIONS CAN EXPAND THE MEANING OF A STATUTE,[19] THE ENACTMENT OF S. 2568 WOULD PRESENT THE POSSIBILITY THAT FUTURE REGULATIONS, OR FURTHER STATUTORY AMENDMENT, COULD MAKE TAX-EXEMPT ORGANIZATIONS "RECIPIENTS" BY THE MERE FACT OF THEIR TAX-EXEMPT STATUS. IN ANY EVENT, AS S. 2568 NOW STANDS, SUCH A TAX-EXEMPT ORGANIZATION COULD BECOME A "RECIPIENT" IF A DONOR ENDORSED

HIS SOCIAL SECURITY CHECK TO IT.

FINALLY, IT IS IMPORTANT TO NOTE THAT ONE OF THE MOST BURDENSOME FEATURES OF S. 2568 IS ITS ALLOWANCE OF PRIVATE LITIGATION TO ENFORCE ALL FOUR STATUTES AGAINST THOSE DEFINED BY THE BILL AS RECIPIENTS OF FEDERAL AID. WHILE MONEY DAMAGES ARE GENERALLY NOT RECOVERABLE IN SUCH ACTIONS, ATTORNEYS' FEES AND COSTS ARE. THE POTENTIAL OBLIGATION OF PAYING THE PLAINTIFF'S ATTORNEYS' FEES AND COSTS AS WELL AS PAYING THEIR OWN COST OF DEFENDING SUCH LITIGATION IS A THREAT TO THE VERY SURVIVAL AS WELL AS THE INTEGRITY OF CHURCHES, RELIGIOUS SCHOOLS AND ALL PRIVATE INSTITUTIONS.

THE NET CONCLUSION FROM ALL THAT HAS BEEN SAID ABOUT S. 2568 IS THAT THE BILL IS ILL-CONCEIVED AND A PRODUCT OF UNDUE HASTE.

I HOPE THAT ITS EXPANSION OF THE CATEGORY OF RECIPIENTS OF FEDERAL AID AND ITS EXPANSION OF THE ENFORCEMENT POWERS OF FEDERAL AGENCIES WILL BE RECONSIDERED. AND I HOPE THAT SUCH RECONSIDERATION WILL INCLUDE AN EXAMINATION OF THE NEGLECTED FIRST HALF OF THE GROVE CITY DECISION - THE HOLDING THAT AID TO THE STUDENT IS AID TO THE SCHOOL. THAT HOLDING EFFECTIVELY BARS FROM FEDERAL PROGRAMS OF AID TO STUDENTS ALL THOSE YOUNG PEOPLE WHO WANT AN EDUCATION AT A TRULY INDEPENDENT PRIVATE COLLEGE WHICH OPERATES WITHOUT THE BURDENS AND CONTROLS THAT FOLLOW UPON THE RECEIPT OF FEDERAL AID. THOSE COLLEGES AND THEIR STUDENTS THEMSELVES HAVE CIVIL RIGHTS, ESPECIALLY OF FREEDOM OF CONSCIENCE, WHICH ARE WORTHY OF PROTECTION.

FOOTNOTES

1. S. 2568 AND H.R. 5490.

2. 104 S. CT. 1211 (1984)

3. 104 S. CT. AT 1220.

4. 104 S. CT. AT 1222.

5. SEC. 2(b)(2).

6. TESTIMONY OF CLARENCE M. PENDLETON, JR., CHAIRMAN OF U.S. COMMISSION ON CIVIL RIGHTS BEFORE HOUSE COMMITTEES ON JUDICIARY AND EDUCATION AND LABOR, MAY 16, 1984, P. 4.

7. SEE GUARDIANS ASS'N V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 103 S. CT. 3221 (1983).

8. 20 U.S.C., SEC. 1681 (a)(3).

9. 34 C.F.R., SEC. 106.12(b).

10. SEE C.F.R. 106.40(a), "A RECIPIENT SHALL NOT APPLY ANY RULE CONCERNING A STUDENT'S ACTUAL OR POTENTIAL APRENTAL, FAMILY, OR MARITAL STATUS WHICH TREATS STUDENTS DIFFERENTLY ON THE BASIS OF SEX."

11. SEE C.F.R. 106.36.

12. SEE C.F.R. 106.40(b)(1), "A RECIPIENT SHALL NOT DISCRIMINATE AGAINST ANY STUDENT, OR EXCLUDE ANY STUDENT FROM ITS EDUCATIONAL PROGRAM OR ACTIVITY, INCLUDING ANY CLASS OR EXTRECURRICULAR ACTIVITY, ON THE BASIS OF SUCH STUDENT'S PREGNANCY, CHILDBIRTH, FALSE PREGNANCY, TERMINATION OF PREGNANCY OR RECOVERY THEREFROM, UNLESS THE STUDENT REQUESTS VOLUNTARILY TO PARTICIPATE IN A SEPARATE PORTION OF THE PROGRAM OR ACTIVITY OF THE RECIPIENT."

13. CONG. REC., APRIL 12, 1984, S4594.

14. S. 2568, SEC. 2(c)(2)(C).

15. TESTIMONY OF WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, BEFORE THE HOUSE COMMITTEE ON EDUCATION AND LABOR, MAY 22, 1984; SEE ALSO PROF. CHESTER E. FINN, JR., CIVIL RIGHTS IN NEWSPEAK, WALL STREET JOURNAL, MAY 23, 1984.

16. STATEMENT OF SENATOR ROBERT DOLE (R-KANS.), CONGRESSIONAL RECORD, APRIL 12, 1984, S5490.

17. 103 S. CT. 1997(1983).

18. 103 S. CT. 2017(1983).

19. SEE GUARDIANS ASS'N V. CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, 103 S. CT. 3221 (1983).

PREPARED STATEMENT OF DANIEL OLIVER
GENERAL COUNSEL, DEPARTMENT OF AGRICULTURE

Mr. Chairman, it's a pleasure to appear before your Committee again, and I welcome this opportunity to present my views on S. 2568 entitled the "Civil Rights Act of 1984."

This Administration, as you do know and all should know, is committed to the principles of non-discrimination and equal opportunity. Those principles and this Administration's commitment to them and efforts on behalf of them have been eloquently described by others, especially by the Honorable Wm. Bradford Reynolds, the distinguished Assistant Attorney General for the Civil Rights Division. That commitment is not in dispute here -- is not in dispute anywhere where serious people are gathered together -- and I will say no more about it, except that I am heartily in concurrence with it.

Mr. Chairman, S. 2568 was introduced following the Supreme Court's decision in the Grove City case (Grove City College v. Bell, 104 S. Ct. 1211 (1984)). The stated purpose of the bill is, as I understand it, to reverse only a single holding of that decision, specifically, the Court's holding that the law prohibiting discrimination on the basis of gender (Title IX of the Education Amendments of 1972) prohibits such discrimination only in programs or activities receiving Federal financial assistance.

Some have said that that reading of the law (which I will call the "program-specific" reading) -- and I should add here that the laws prohibiting discrimination on the grounds of race, handicap, and age have the same provision -- some have said that that program-specific reading represents a "new interpretation" of the anti-discrimination laws.

I believe that is not so. Every Federal court of appeals that has considered the issue has adopted the program-specific reading -- every court, that is, except the Third Circuit, in the Grove City case. And, of course, the Third Circuit was overruled by the Supreme Court.

But more important for our purposes here this morning, Mr. Chairman, the statutes' focus on activities receiving Federal financial assistance rather than on recipients of that assistance is the basis of the Department's current and long-standing view that these anti-discrimination laws are concerned, not with the activities of the ultimate beneficiaries of Federal financial assistance, but with the activities of the groups and individuals through which the government works to provide assistance to those ultimate beneficaries.

This understanding of many years is reflected in the regulations of the Department of Agriculture and of other agencies implementing the Federal anti-discrimination laws. Specifically, the regulation defining "recipient" excludes from that definition the ultimate beneficiaries of a program or activity (7 C.F.R. 15.2(e)).

It is important to note that this specific exclusion of ultimate beneficiaries is not grounded in any statutory definition of a recipient of Federal financial assistance or in any other specific statutory exclusion. It is grounded in the fact that the anti-discrimination statutes are directed at programs or activities receiving Federal financial assistance and therefore appear not to be directed at the ultimate beneficiaries of the assistance under those programs.

S. 2568 would amend Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Age Discrimination Act of 1975 to prohibit discrimination by "recipients of Federal financial assistance" rather than discrimination in programs and activities receiving Federal financial assistance. If this legislation is enacted, it appears doubtful that the current exclusion of ultimate beneficiaries from the definition of recipients of Federal financial assistance could be continued. Indeed, from the proposed bill's tracking of all the language of the present regulation defining a recipient, except that portion relating to the ultimate beneficiary, it seems entirely fair to infer a legislative intent to preclude continuation of the exemption of the ultimate beneficiary, and I certainly would not be surprised if a court made that inference.

The definition in the proposed bill of a recipient is as follows:

> "(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and
>
> "(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity of any such subunit,
>
> to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

I realize, Mr. Chairman, that some people may say that that definition of a recipient of Federal financial assistance does not, could not, and was not intended to, include a farmer. I suggest, nevertheless, that that language could indeed include a farmer.

In the first place, it is not clear what is meant by the word "entity" contained in section (A) of S. 2568's definition of a recipient.

Let us take the case of a Farmer Program loan, extended directly to a farmer by the Farmers Home Administration. Currently, the anti-discrimination laws do not apply to Farmer Program loans, because the farmer is considered to be the ultimate beneficiary. Under the proposed bill, however, there is no exclusion for ultimate beneficiaries, and it is at least plausible to say that the farmer is included within the bill's definition of a recipient of Federal financial assistance.

Cannot a farmer be an "entity?" And even if a farmer in his individual capacity is not an "entity," -- and I am not sure he is not -- what about his farming operation? What if that operation is a huge corporation, employing hundreds of people -- is that not an "entity" within the meaning of the statute? S. 2568 is sufficiently ambiguous to leave unresolved whether or not the farmer or his operation would be a recipient under the proposed definition.

Mr. Chairman, in addition to there being a real possibility of a farmer's being included within section (A) of the definition of recipient contained in the proposed bill, there is also a real possibility that some farmers will be included within section (B) of that definition.

Let us consider, for example, a tobacco farmer. All tobacco price support loans are provided to farmers through producer associations. These associations are, even now, considered by the Department of Agriculture to be covered by the anti-discrimination laws. They are the recipients of the Federal financial assistance being provided, but they are not the ultimate beneficiaries of that assistance. Therefore, their price support activities are subject to the prohibitions of the Federal anti-discrimination laws. The individual tobacco farmer, himself, however, is not currently considered to be covered by those laws, because it is he who is considered to be the ultimate beneficiary of the Federal financial assistance.

Under the proposed bill, however, I believe such a tobacco farmer might be subject to the anti-discrimination laws. Under section (A) of the proposed bill's definition of a recipient, the producer association would almost certainly be a recipient. It is certainly a "private" ... "organization" ... "to which Federal financial assistance is extended." And under section (B), because the farmer would seem to be a transferee of the cooperative or association, he might also be a recipient. It certainly would not be an unreasonable interpretation to say he was a recipient.

Now, Mr. Chairman, let us consider some of the people and business organizations -- dare we call them "entities"? -- the farmer does business with.

Let us return to our farmer who received a Farmers Home Administration loan, and let us suppose he puts half of the money in a bank, and spends the other half on fertilizer and a tractor. It is not at all clear that the bank, the seller of the fertilizer, and the seller of the tractor are not covered by the definition of recipient contained in the proposed bill. I believe the bank and the farmer's input suppliers could be covered by this bill if Grove City College is meant to be covered by the bill's definition. The only Federal funds Grove City College received, it received from students who had obtained grants from the Federal Government. If those funds retain the characteristic of being Federal assistance even after they leave the students' hands, why won't the funds lent to a farmer retain that same Federal assistance characteristic when the farmer pays them to the tractor salesman, or when he stores them in the bank? If those funds remain assistance, then those funds are "Federal financial assistance" that is being "extended" to a "private organization" (the banker or tractor seller) "through" "a person" (the farmer), and the banker and tractor seller become recipients.

Mr. Chairman, let me hasten to add that I assume the sponsors of this bill intend that the colleges to which the students pay over their grants will be covered by the laws that this bill would amend. But we have a paradox here. What I don't understand is how these laws, if they are amended by S. 2568, will cover colleges but not a farmer's bank or the stores where he buys his fertilizer or tractor.

Finally, Mr. Chairman, let me say that if the American farmer and the people he does business with -- his banker, his input suppliers, his implement dealers -- are meant to be covered by the Federal anti-discrimination laws by reason of this amendment to them, I believe the enforcement effort the Department of Agriculture would have to mount would be staggering. I have no idea how it would be performed, and I am not prepared to discuss it here this morning. I would say only that if the Department is to take on an obligation of that magnitude, policing every farmer and every person he does business with, Congress should ask it to do so in a more explicit manner than is contained in this proposed bill.

In concluding, Mr. Chairman, I should like to note that despite extensive debate on the floors of the House and Senate over the meaning of certain portions of Title IX, including specifically the program and activity language, there remains today -- even after the Supreme Court's decision in Grove City -- disagreement on what it was that Congress intended by that language. Clearly some of the language in S. 2568 is also ambiguous. Under the circumstances, it would seem wise to take enough time fully to consider the language and implications of such a sweeping proposal, and to take the care to craft such a proposal with sufficient precision that another generation of lawyers and their clients will not have to guess at its meaning.

Mr. Chairman, I would be happy to try to answer any questions you may have.

SECTION 2.--COMMENTARIES AND CORRESPONDENCE

"CIVIL RIGHTS ACT OF 1984" (S.2568)
Critical Commentary

PRESIDENT RONALD REAGAN

"... so broad that actually it would open the door to Federal intrusion in local and state governments and in any manner of ways beyond anything that has ever been intended by the Civil Rights Act."

AMERICAN FARM BUREAU FEDERATION

"We are concerned that the broad, vague, and all-encompassing language contained in S.2568... may be an open invitation to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation."

U.S. CHAMBER OF COMMERCE

"Examples of questions of concern to the business community remaining unanswered include: (1) whether grocery stores will be subject to regulation because they accept food stamps; (2) whether farmers who receive crop subsidies would be subject to regulation; (3) whether pharmacists would be subject to regulation because they receive payment from Medicare or Medicaid. The Chamber believes that S.2568 has not received adequate consideration or deliberation by the Senate."

NATIONAL ASSOCIATION OF COUNTIES

"We are concerned that the proposed legislation may extend the force and coverage of the civil rights laws far beyond their original scope. Moreover, we are concerned that it may subject counties to unreasonable federal scrutiny and administrative burdens."

U.S. CATHOLIC CONFERENCE

"The definition of "recipient" in S.2568 is unclear and could extend the reach of the four statutes to an organization which does not itself receive federal financial assistance... could lead to unwarranted governmental intrusion into the internal affairs of religious organizations... we also wish to reiterate here our broader concern with the way in which Title IX regulations require institutions receiving federal financial assistance to treat abortion in the same fashion as other temporary disabilities for the purposes of student and employee leave and health policies."

NATIONAL ASSOCIATION OF MANUFACTURERS

"The definition of the word "recipient" could potentially reach far beyond the parameters of the Grove City situation. Additionally, "federal financial assistance" which is defined in each of the four statutes applies to both direct and indirect recipients, many of whom are far removed from any reasonable inference that they are recipients of federal assistance (e.g. Is a supermarket that accepts food stamps from its customers a recipient of federal assistance?)."

AMERICAN HOSPITAL ASSOCIATION

"The proposed act could greatly expand the reach of federal agencies, create compelling or inconsistent requirements for hospitals, and could add greatly to the regulatory burden of one of the most highly regulated segments of our economy."

NATIONAL GOVERNOR'S ASSOCIATION

"Conflicting testimony by many witnesses has raised new questions of scope, coverage, definitions, compliance, and enforcement. Since the proposed legislation would seem to cover all activities of all direct and indirect recipients of federal aid, the intergovernmental management implications for state and local government would seem to be substantial. It is also unclear how the proposed changes would affect the local general revenue sharing program and state and local government block grants."

U.S. DEPARTMENT OF AGRICULTURE

"We are concerned that, if S.2568 is enacted in its present form, it would so broaden the reach of the federal laws regarding discrimination that it would make them applicable to over 2,000,000 individual farmers who are recipients of Federal loans and grants under programs administered by this department."

NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES

"S.2568 contains some surprisingly serious ambiguities. The entire bill is shot through with major uncertainties about its meaning... utter disregard in the language for the lines that have traditionally marked the boundaries between the public and private sectors or the boundaries between federal and state sectors... Limited resources of the small, independent college may make it virtually impossible to fully shoulder their compliance duties. Their only answer may be to ask for additional federal funds to cover compliance costs."

BAPTIST JOINT COMMITTEE

"... deeply concerned about the section of the Act which included "other entities"-- without definition of that term-- as recipients of federal financial assistance... concerned that churches and those agencies integral to their religious mission might be brought unconstitutionally under the supervision and control of administrative agencies and their regulations."

U.S. COMMISSION ON CIVIL RIGHTS

"Congress, we believe, should write as clear and precise a bill as possible... would be unfortunate if we left up to the courts to determine what the bill meant... it would be unfortunate if the Congress were to end up sounding like J.Alfred Prufrock in the poem by T.S. Eliot muttering forever, "That's not what I meant. That's not what I meant at all.""

NATIONAL FEDERATION OF INDEPENDENT BUSINESSES

"The language of this legislation is extremely broad and ambiguous with respect to its impact on small firms... The definition of "recipient" is so broad and all-encompassing as to overwhelm efforts to determine its precise impact... it would appear that there is some credence to the view that any part of a public or private enterprise could be subjected to federal civil rights regulations and enforcement procedures, however distant un-aided activities may be from the activity receiving federal financial assistance."

AGUDATH ISRAEL

"It is precisely because we take this concept of civil rights so seriously that we are concerned about the potential implications of this bill... carries with it the potential for great mischief. The Orthodox Jewish community is particularly concerned that this bill not have the effect of limiting parents' and students' educational options."

U.S. DEPARTMENT OF LABOR

"We are concerned that clarification of the bill's requirements is necessary if we are to avoid adversely affecting the willingness of private sector employers to get involved in programs under the Job Training and Partnership Act and the Emergency Veterans Job Training Act. It is possible that S.2568 would cause employers to avoid federally supported training and employment services..."

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

"Congress ought not set in motion a piece of legislation which is as unready as is this to be considered a safe vehicle for public use... [Commitment to civil rights] does not mean that these small, self-supporting religious schools should be paved over with burdensome regulation, arbitrary and costly compliance requirements, and have thrust upon them the jurisdiction of governmental agencies with inevitable surveillance."

AMER. ASSOC. OF PRESIDENTS OF INDEPENDENT COLLEGES & UNIVERSITIES

"The "recipient" definition's reliance on an indirect benefit theory brings within its reach every imaginable kind of private or local governmental activity. In its application to charitable organizations in general, the indirect benefit theory of this bill sets the stage for a future attack upon the entire concept of tax exemptions."

HERITAGE FOUNDATION

"It appears from the plain language of S.2568 that participation in federal revenue sharing programs will bring each and every activity of the states under the scope of federal civil rights laws. The result will inevitably be to erase any distinction between federal and state action. The states will truly become no more than administrative units of the federal government."

U.S. DEPARTMENT OF JUSTICE

"The sweeping scope of the language proposed in the bill might well have much broader application than simply the reversal of the Grove City decision... the perhaps unintended ramifications of the bill are certain, at best, to create confusion in recipients, agencies, and courts. At worst, they may include impermissible interference with important state prerogatives or lead to adverse judicial decisions as to their enforceability."

LABOR POLICY ASSOCIATION

"Significantly, the bills under consideration go far beyond reversing the Grove City decision... Private employers who now face the possibility of litigating a single claim of discrimination in several different forums could have this burden increased substantially if the proposed legislation were passed."

MORAL MAJORITY

" The bill grants the federal government control over a wide range of newly expanded areas, going far beyond the pre-Grove City decision... opens the door for grave entrenchment of religious civil liberties."

CITIZENS FOR EDUCATIONAL FREEDOM

"This legislation defines a "recipient" of federal funds and it does so in such a broad way as to include just about everyone in the United States, from the independent truck driver who delivers federally subsidized milk to the local public school to the owners of a "mom and pop" grocery store that accepts food stamps."

ASSOC. OF ADVANCED RABBINICAL AND TALMUDIC SCHOOLS

"When the Civil Rights Act of 1984 first came to my attention... I felt comfortable recommending to my colleagues that Congress should see to its speedy implementation... Further investigation and review of the testimony of several other groups has led to the realization that bill might have some very serious-- and negative-- implications."

AMERICAN ASSOCIATION OF CHRISTIAN SCHOOLS

"It would drastically change our system of government by making just about everybody and everything a "recipient" of indirect federal financial assistance. Massive federal controls would be imposed on almost all public and private activity."

PROFESSOR CHARLES FRIED (HARVARD LAW SCHOOL)

"This bill represents our legislative process at its worst. It would make major changes in the structure of our anti-discrimination laws, in the balance of responsiblity between the federal government and the states, in the balance between the responsibilities and prerogatives of private institutions and bureaucratic authority over those institutions... a legislative nuclear time bomb."

JAMES J. KILPATRICK

"The bill is a hoax, a deception, a fraud... These sweeping provisions would apply not only to the states and to every "political subdivision thereof" but also to every "private agency, instrumentality, institution, organization, or other entity... Any person who is taken in by that sweet talk [of the sponsors] should read the House and Senate bills. Just read them. The words in this legislation are not hard words; any sixth grader could understand them. Grown-ups should read them and demand to know just what in the holy name of civil rights is going on here."

WALL STREET JOURNAL

"The upshot is that federal regulations-- complete with quotas and private enforcement suits-- would apply to just about everyone who gets federal money of any sort, even if indirectly. This includes approximately all of us."

American
Association for
Affirmative
Action

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August 8, 1984

The Honorable Orrin Hatch
United States Senate
Washington, D.C. 21510

Dear Senator Hatch:

On behalf of the members of the American Association for Affirmative Action and all members of the "protected classes" whose rights we defend, I am writing to you to urge immediate passage of S. 2568, the Civil Rights Act of 1984, without altering its original intent through any amendments.

We plan to use our national network of supporters and the networks of other civil rights groups to monitor your action on this most significant bill. We urge you and your colleagues on the committee to take affirmative action on S. 2568 in its present form, cognizant of the fact that many of your constituents, who will be affected by the bill, will vote in the November election.

Sincerely,

Robert W. Ethridge

Robert W. Ethridge, Ph.D.
President

RWE:bn

AMERICAN ATHEISTS 2210 Hancock Drive, Austin, Texas 78756

JUDICIARY

4th June, 1984

In re: Civil Rights Act of 1984
H. R. 5490 and S. 2568

Dear Congressman,

We want to call your attention to the wording of the above captioned act now before you for consideration.

The language in this bill would prohibit any form of discrimination "by race, age, sex, religion, nationality or handicap."

We respectfully submit that the word "religion" does not include the ideological position of Atheists, freethinkers, agnostics and secular humanists. These individuals and groups, while having no religion at all, do have ideological positions* by which they live. Yet, the groups and individuals are frequently the object of discrimination.

We suggest that the word "religion" be replaced by the phrase "opinions in respect to religions" or whatever substitute therefore may seem equitable to the end of including in the coverage of this act both religious persons and persons without religion.

The bill should make clear that all minorities are protected so that no official anywhere, high or petty, can prescribe what shall be orthodox in religion or other matters of opinion, or force a citizen to confess by word or act their faith therein.

We solicit your support in this matter.

May we have your opinion on the merits, so that we may inform your and our constituency?

AMERICAN ATHEISTS

Jon G. Murray

Jon G. Murray
Director, American Atheist Center

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*In the case of Athiests, this life style is designated as their "Weltanschauung."

JGM:eis

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Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

May 30, 1984

Dear Senator:

The ACLU urges prompt passage of S. 2568, "The Civil Rights Act of 1984" as introduced. We ask that you co-sponsor S. 2568 and work toward the quick passage of this legislation.

The purpose of S. 2568 is to clarify the effective enforcement of federal civil rights statutes jeopardized by the Supreme Court decision in Grove City College v. Bell, narrowly interpreting Title IX of the Education Amendments of 1972, the statute which prohibits sex discrimination in federally assisted education programs.

In Grove City, the Supreme Court held that the prohibition in Title IX applies only to the particular education "program or activity" receiving the federal funds. Since the only federal money reaching Grove City college came through aid to students under the Basic Educational Opportunity Grants (BEOG) program, only the school's student financial aid program was held covered by Title IX. As a consequence, sex discrimination occurring in other parts of the university could not be remedied. The Court's narrow interpretation of Title IX not only weakens the enforcement of this important law but may significantly weaken the enforcement of other major civil rights laws.

In order to restore Title IX coverage and avoid weakening the coverage of other civil rights statutes, a bipartisan group of senators has introduced S. 2568. "The Civil Rights Act of 1984" would make no changes in current civil rights statutes other than those necessary to ensure consistency with the original intent of Congress that was frustrated by the Grove City decision. Therefore, S. 2568 makes precisely tailored wording changes in Title IX, Title VI of the 1964 Civil Rights Act (on which Title IX is modeled) prohibiting discrimination based on race, color and national origin in federally assisted programs, Section 504 of the Rehabilitation Act of 1973, prohibiting handicap discrimination in federally assisted and federally conducted activities and the Age Discrimination Act of 1975.

S. 2568 modifies the enforcement sections of these civil rights statutes to ensure that they are not weakened in the wake of the *Grove City* decision. However, the bill does not in any way broaden the important enforcement tool of funding termination. Even when a recipient of federal funds is covered in its entirety by the prohibition on discrimination the enforcement option of terminating federal funds is limited to the particular aid which supports the discriminatory activities. This limitation has always been an express part of the law and will not change. Even though fund termination is seldom used, it has been necessary in certain egregious instances of discrimination. In addition, its presence as an option has been useful in encouraging conciliation agreements to end discrimination.

Sponsors of the "Civil Rights Act of 1984" have agreed that this legislation must serve the single purpose of maintaining the strength of the four key civil rights statutes affected by the *Grove City* decision to the status that Congress always intended them to have. Therefore, we urge you to reject all attempts to amend S. 2568.

Prompt passage of S. 2568 in the Senate is needed. Your support of S. 2568 is of great importance in the continued protection of civil rights.

Best Regards.

Sincerely,

John Shattuck
Director

Muriel M. Spence
Muriel Morisey Spence
Legislative Counsel

AFSCME

American Federation of State, County and Municipal Employees
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Honolulu, Hawaii

George E. Popyack
Redwood City, Calif.

Earl Stout
Philadelphia, Pa.

Garland W. Webb
Baton Rouge, La.

Maynard White
Houston, Texas

August 8, 1984

Dear Senator:

On behalf of the American Federation of State, County and Municipal Employees, I urge you to support S. 2568, The Civil Rights Act of 1984. This legislation is needed to reverse the narrow interpretation of the scope of Title IX by the Supreme Court in Grove City v. Bell and restore the original intent of Congress.

In the Grove City College case, the Court held that only the program or activity receiving financial assistance is subject to Title IX. Until that decision it was assumed that recipient institutions would be barred from federal aid if it discriminates. S. 2568 merely restores the traditional scope of Title IX so as to make sure that federal aid does not go to institutions that discriminate on the basis of sex.

The issues in S. 2568 go beyond sex discrimination. If the Grove City College decision is not responded to by Congress, statutes banning discrimination based on race, religion, handicap or age could also be weakened by a similar narrow interpretation.

We in AFSCME urge you to support S. 2568 and to oppose any weakening substantive amendment. Additionally, we urge you to consider this legislation as quickly as possible.

Sincerely,

Bill Welsh

William B. Welsh
Director of Legislation

WBW:mlm

in the public service

American Hospital Association

AHA

444 North Capitol Street N.W.
Suite 500
Washington D.C. 20001
Telephone 202.638.1100
Cable Address: Amerhosp

1974 JUN 13 PM 2:06

June 12, 1984

Dear Senator Hatch

This letter is submitted by the American Hospital Association to express the concerns of certain of its hospital members regarding the scope of the Civil Rights Act of 1984. The AHA believes that it is appropriate for the Committee to be advised of the nature of these concerns, particularly to the extent that they are consistent with issues raised previously by witnesses from the Administration.

There is no question that hospitals subscribe to the purposes and objectives of federal civil rights laws, which may be summarized as nondiscrimination on the basis of race, color, creed, national origin, age, sex, or handicap. Indeed, within these several bases may be found epidemiologic and social factors which define important health care needs of American population subgroups. Accordingly, hospitals do not suggest that health services should be immune from appropriate requirements for nondiscrimination.* However, we are concerned about an unintended consequence of the Civil Rights Act of 1984; that is, the possible hindrance of efforts to deliver hospital care effectively and in accordance with appropriate standards of medical care. Two concerns in particular warrant your attention:

> First, the statutory elimination of the "program-specific" limitation defined by the U.S. Supreme Court in the Grove City decision, may hinder otherwise reasonable efforts to assure nondiscrimination and may cause hospitals to lack knowledge of the legal standards to which they would be held. For example, many hospitals are legal entities of state or local government. Others are divisions of corporations which carry on commercial, research, or other non-patient care functions in totally separate divisions. Still others are part of, or affiliated in a less formal manner with, public institutions of higher learning.

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* The exact scope of these requirements, as they may pertain to hospitals by virtue of their participation in the Medicare and Medicaid programs, presently remains at issue before the courts.

Under H.R. 5490, it has been suggested that educational assistance to a university would trigger enforcement responsibilities for federal education agencies within a hospital affiliated with, but not part of, the university. Or, federal assistance to a county's road program would cause requirements promulgated by federal transportation agencies to be enforced against the county hospital. In a third case, federal assistance to a hospital would bring associated nondiscrimination requirements to bear on an unassisted medical research organization owned by the hospital's parent corporation. These hypothetical consequences, although perhaps not intended, indicate that the proposed Act could greatly expand the reach of federal agencies, create competing or inconsistent requirements for hospitals, and could add greatly to the regulatory burden of one of the most highly regulated segments of our economy.

It has been suggested that the purpose of the Civil Rights Act of 1984, i.e., to overturn the program-specific result of Grove City, could be accomplished in a more carefully drawn and narrower fashion, particularly if legislative consideration were more open and thorough.

The second issue concerns the apparent potential of this bill, in its approach to reversing Grove City, to fundamentally change the legal standard under the amended acts from one of intent to discriminate to one of discriminatory effect. If so construed, this change could be a significant problem in the delivery of medical care.

As noted, the prohibited bases of discrimination also define population subgroups with particular medical problems. Thus, for example, handicap is both a prohibited basis for discrimination and a defining characteristic of an individual's medical condition. Questions of discrimination against a particular subgroup under an "effects" test may well put federal agencies in the untenable and inappropriate role of defining standards of medical care. Indeed, the recent "Baby Jane Doe" controversy in New York demonstrated the difficulty of defining discrimination, even under existing interpretations of the law, in the context of decisions to provide a specific course of medical treatment. Although we do not believe this legislation would undo the appropriate interpretation of Section 504 rendered by the U.S. Court of Appeals for the Second Circuit in the "Baby Jane Doe" case, we fear that the ambiguities which necessitated such litigation would be increased.

Again, it would appear that more deliberate consideration of the options available to overturn the Grove City decision would be appropriate for the purpose of avoiding these untoward results.

Finally, we would like to call the Committee's attention to an enforcement issue raised by the legislation. H.R. 5490 would overturn judicial interpretation of the "program-specificity" requirements of federal law, which interpretation was adhered to in all federal judicial circuits (except the Third

Circuit in Grove City). To the extent complaints brought under the several acts remain unresolved at the administrative or judicial levels at this time, sanctions flowing from determinations of noncompliance following the enactment of H.R. 5490 should be prospective only. Assisted entities should not suffer the termination of such assistance as a result of actions taken in compliance with the law as it now exists. Although we believe this to be the intent of H.R. 5490, we believe an explicit statement of this intent to be necessary.

In conclusion, the AHA does not seek special treatment for its membership under the civil rights laws to the extent their activities are legitimately deemed within the scope of those legal obligations. It does appear, however, that the existence of significant interpretive concerns arising out of the bill's ambiguities argues convincingly for additional deliberations and the development of more precisely focused legislation. We would be pleased to add our resources to any effort which the Committee might undertake to cure these problems.

Please feel free to contact me or Richard L. Epstein, AHA Senior Vice President and General Counsel in our Chicago Office, if we may provide further assistance or clarification of the issues raised herein.

Sincerely

Jack W Owen

Jack W. Owen
Executive Vice President

mm

ALEC
AMERICAN LEGISLATIVE EXCHANGE COUNCIL
214 Massachusetts Avenue, N.E. Suite 400
Washington, D.C. 20002
(202) 547-4646

June 8, 1984

Senator Orrin Hatch
Chairman
Committee on the Judiciary
SD 224
Washington, D.C. 20515

Dear Senator Hatch:

As Republican and Democratic state legislative leaders from across the country, we are deeply concerned about the effects S. 2568, the so-called Civil Rights Act of 1984, would have on the states.

We urge you to hold additional hearings on this highly controversial and potentially far reaching legislation and, at such time, would welcome the opportunity to express our views on the measure.

Sincerely,

Bill Ceverha

Bill Ceverha
Texas House of Representatives
ALEC National Chairman

Norma Russell
South Carolina Senate
ALEC First Vice Chairman

Roy Cagle
Missouri House of Representatives
ALEC Second Vice Chairman

John Brooks
Idaho House of Representatives
ALEC Secretary

Larry Pratt
Former Member, Virginia House of Delegates
ALEC Treasurer

Donald E. "Buz Lukens
Ohio Senate
ALEC Immediate Past Chairman

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House of Representatives
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Former Member, Virginia Senate
ALEC Board of Directors

T.W. Stivers
Speaker, Idaho House of Representatives
ALEC Board of Directors

Ray Taylor
Iowa Senate
ALEC Board of Directors

Donald Totten
Former Member, Illinois Senate
ALEC Board of Directors

amsa
The American
Medical Student
Association/Foundation

1910 Association Drive
Reston, VA 22091

703.620.6600

The Honorable Orrin Hatch
Senate Office Building
Washington, D.C. 20510

June 11, 1984

Dear Senator Hatch:

This letter is to inform you that the American Medical Student Association, representing over 25,000 medical students at 140 medical schools across the country, strongly supports S.2568, the Civil Rights Act of 1984.

The Civil Rights Act of 1984 is intended to restore four very important civil rights statutes--title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964. The effectiveness of these statutes has been threatened by the recent Supreme Court decision in Grove City College v. Bell. If these statutes are interpreted in a similarly narrow fashion, the proper protection from discrimination provided by the government to the elderly, minorities and disabled will no longer be available. The Civil Rights Act of 1984 is designed to clarify the intent of Congress when the original statutes were passed--that each of these laws provide broad and comprehensive coverage.

We firmly believe that you should support the Civil Rights Act of 1984. The bill is crucial to restoring the broad federal protection from discrimination that was originally intended by Congress. This bill should be considered in the Senate as soon as possible. We urge you not to accept any amendments to this resolution and to vote for it when it reaches the Senate floor.

Thank you. I hope to hear from you soon on this matter.

Sincerely yours,

William J. Kassler
National President

WJK/tw

ada

AMERICANS FOR DEMOCRATIC ACTION
Suite 850
1411 K Street NW
Washington, D.C. 20005
(202) 638-6447

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Marvin Rich *Chairperson National Executive Committee*

Charlie King *Chairperson Youth Caucus*

Warlene Gary *Treasurer*

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July 27, 1984

Dear Senator:

Americans for Democratic Action urges you to support the Civil Rights Act of 1984 -- S.2568. This legislation would simply return the interpretation and enforcement of our nation's major civil rights laws to their pre-*Grove City College v. Bell* status. S.2568 would return Title IX of the Education Amendments of 1972, Title VI of the 1964 Civil Rights Act, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975 to the coverage that was the original intent and interpretation of Congress.

We believe that the United States must guarantee equality of opportunity for all persons. That guarantee requires a commitment that the rights of all citizens will be respected and fully protected by vigorous enforcement of all civil rights laws.

We also strongly urge you to oppose all weakening amendments. This legislation has received vocal bi-partisan support and deserves your favorable vote.

ADA urges you to vote for S.2568 -- the Civil Rights Act of 1984.

Sincerely,

Barney Frank

Barney Frank
President

BF:ct

aac

Association of American Colleges
1818 R Street, N.W., Washington, D.C. 20009
202/387-3760

July 24, 1984

The Honorable Orrin G. Hatch
U.S. Senate
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The Association of American Colleges, by action of its Board of Directors, strongly supports the Civil Rights Act of 1984 (HR5490 and S2568). This legislation would clarify the intention of Congress with respect to the anti-discrimination provisions of Title IX of the Education Amendments of 1972 and avert the effect of the Supreme Court's decision in Grove City College v. Bell. The Court ruled in that case that Title IX did not have broad institutional coverage. Thus, institutions receiving federal assistance through financial aid programs are only prohibited from discriminating in their financial aid program, not in other programs supported by the general and educational income of the institution.

Our Association, which has always supported the broad interpretation given to Title IX by the Executive Branch prior to the Supreme Court decision, believes that the effect of the Supreme Court decision should be rectified by Congress. Educational institutions should lead the way in eliminating discrimination based on race, color, national origin, handicap and age. The Civil Rights Act of 1984 would further that goal by ensuring that Title IX, Title VI (prohibiting discrimination based on race, color and national origin), Section 504 of the Rehabilitation Act (prohibiting discrimination based on handicap) and the Age Discrimination Act continue to help institutions set the highest standards for equity.

Our Association consists of 565 members - a broad spectrum of educational institutions including public and private research institutions, comprehensive colleges and universities, liberal arts colleges and others. We strongly urge you to support the Civil Rights Act of 1984.

Sincerely,

Mark H. Curtis

Mark H. Curtis
President

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL
NATIONAL/INTERNATIONAL HEADQUARTERS
MAILING ADDRESS: P.O. BOX 4097, WHITTIER, CA 90607
STREET ADDRESS: 731 N. BEACH BLVD., LA HABRA, CA 90631
(213) 694-4791

June 8, 1984

Senator Orrin G. Hatch
Room SR-135, The Russell Building
Washington, D.C. 20510

Dear Senator Hatch:

I know you share our concern regarding the Civil Rights Act of 1984. This week I mailed the enclosed special edition of the ACSI Legal/Legislative Update to 10,000 Christian schools in the U.S. On pages 2 and 3 I have listed eight important questions that greatly concern Christian school educators. I would be most grateful if you will answer the questions I have raised. I will gladly publish your responses back to our constituency.

If you need testimony at a Senate hearing, my lawyers representing ACSI or I will gladly cooperate. ACSI is the largest association of Christian schools in the United States.

I look forward to hearing from you.

Sincerely,

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL

Paul A. Kienel
Executive Director

PAK:ja
Enc: 1

"That in all things He might have pre-eminence" Col 1:18

AWIS

ASSOCIATION FOR WOMEN IN SCIENCE, INC.
1346 CONNECTICUT AVENUE, N.W. SUITE 1122
WASHINGTON, D.C. 20036
TEL. 833-1998 · AREA CODE 202

Senator Orrin G. Hatch
US Senate
Washington, DC 20510
June 13, 1984

Dear Senator Hatch,

The Association for Women in Science is a nonprofit organization for women scientists and their supporters. We have been an advocate for women scientists for over 10 years with a national membership of 3,500 and local chapters in 22 states. Our goal is "To promote equal opportunities for women to enter the professions and to achieve their career goals.". Equal access to higher education is essential to this goal. Providing an educational environment that is stimulating and encouraging for both men and women is necessary for attaining national educational goals.

We give our enthusiastic support to S. 2568, the 1984 Civil Rights Bill, as introduced. We believe that the admendments offered do nothing to clairfy its intent. It is important not to dilute the effect of this legislation, which will restore the protection girls and women had under Title IX before the Supreme Court decision in Grove City College vs. Bell. Young women pursuing scientific careers, a traditionally male pursuit, need the protection this bill will provide.

Our members have seen the advances made in education since passage of Title IX in 1972. There is still work to be done and the recent erosion of past accomplishments is to be deplored. We urge your support for a quick passage of this legislation.

Sincerely,

Pam Surk.

Dr. Pamela Surko
President, Assoc. for Women in Science

"TO PROMOTE EQUAL OPPORTUNITIES FOR WOMEN TO ENTER THE SCIENTIFIC PROFESSIONS AND TO ACHIEVE THEIR CAREER GOALS"

BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 MARYLAND AVENUE, N.E., WASHINGTON, D. C. 20002-5797 · 202/544-4226

JAMES M. DUNN
EXECUTIVE DIRECTOR

June 20, 1984

The Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

Enclosed is a copy of the resolution passed by the Southern Baptist Convention last Thursday on the subject of the Civil Rights Act of 1984.

The Convention did not express opposition to the thrust of the Act but was deeply concerned about the section of the Act which included "other entities" -- without definition of that term -- as recipients of Federal financial assistance. Given the Supreme Court's decision in Taxation With Representation v. Regan that tax exemption is Federal financial assistance and the decision in Grove City which this Act addresses, the Convention was concerned that churches and those agencies integral to their religious mission might be brought unconstitutionally under the supervision and control of administrative agencies and their regulations.

The Convention requests that the Act be changed to exclude specifically churches and those agencies integral to their religious mission from the category of "recipients" or that the legislative history, through a floor colloquy, make that exclusion clear.

Thank you for your help in this matter.

Sincerely,

James M. Dunn

James M. Dunn

AMERICAN BAPTIST CHURCHES IN THE U.S.A.
NATIONAL BAPTIST CONVENTION OF AMERICA
PROGRESSIVE NATIONAL BAPTIST CONVENTION, INC.
BAPTIST FEDERATION OF CANADA
NATIONAL BAPTIST CONVENTION, U.S.A.
SEVENTH DAY BAPTIST GENERAL CONFERENCE
BAPTIST GENERAL CONFERENCE
NORTH AMERICAN BAPTIST CONFERENCE
SOUTHERN BAPTIST CONVENTION

ON THE CIVIL RIGHTS ACT OF 1984

WHEREAS, The United States Congress is currently considering the Civil Rights Act of 1984; and

WHEREAS, That Act, because of bipartisan support, will likely pass this summer; and

WHEREAS, that Act seeks to clarify the application of previous existing acts which prohibit discrimination on the basis of race, religion, sex, and age; and

WHEREAS, Many religious schools and exclusively religious organizations have scrupulously avoided direct federal financial assistance so that they could maintain independence from federal regulation and interference; and

WHEREAS, That Act, in defining organizations which are to be considered "recipients" of federal financial assistance includes categories which may be misleading and which could result in undue government intrusion in the affairs of religious organizations, religious schools and institutions.

Therefore, be it RESOLVED, That we,the messengers of the Southern Baptist Convention, meeting in Kansas City, Missouri, June 12-14, 1984 request Congress to give immediate attention either to redefining the term "recipients" in the Act itself or making certain that the legislative history of the Act clearly exempts exclusively religious organizations, religious schools, and institutions from being defined as recipients of Federal financial assistance under the Act; and

Be it finally RESOLVED, That the Christian Life Commission and the Baptist Joint Committee on Public Affairs be requested to notify the Congress of this resolution as soon as possible.

Passed June 14, 1984

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

ALBERT D. BOURLAND
VICE PRESIDENT
CONGRESSIONAL RELATIONS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5000

July 26, 1984

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Chamber of Commerce of the United States, and its nearly 200,000 business members, I wish to express our opposition to S. 2568, the Civil Rights Act of 1984, in its current form.

Proponents of this legislation assert that it merely returns the law to its status prior to the February 28, 1984 Supreme Court ruling in Grove City College v. Bell.

In Grove City, the Court held that Title IX of the 1972 Education Act Amendments -- which prohibits discrimination by educational institutions receiving federal funds -- applies only to the program receiving federal aid and not to the entire institution. Nevertheless, S. 2568 applies not only to Title IX, but also to the 1964 Civil Rights Act, the 1973 Rehabilitation Act and the Age Discrimination Act of 1975. This bill would modify these statutes by extending their requirements to any recipient (direct or indirect) of federal aid, and not just to the program receiving the aid.

Although the Chamber remains firmly committed to the principle of equal opportunity for all, such a change would be a radical and unnecessary expansion of federal authority and go far beyond what is necessary to reverse Grove City. The employment practices of numerous small businesses would be subjected to federal regulation for the first time. For example, coverage would be triggered if a grocery store accepted food stamps, because the store would be an indirect recipient of federal assistance.

For these reasons, as your Committee begins markup, we urge you to limit the scope of S. 2568 to Title IX of the 1972 Education Act Amendments. This approach would achieve the purported goal of the bill's proponents -- reversal of the Grove City decision -- without a radical and unnecessary expansion of federal authority.

Thank you for your consideration of our views.

Sincerely,

Albert D. Bourland

CEF
CITIZENS FOR EDUCATIONAL FREEDOM
SUITE 854 WASHINGTON BUILDING   15TH STREET & NEW YORK AVE., N.W.
WASHINGTON, D.C. 20005   AREA CODE 202-638-6423

June 5, 1984

Senator Orrin Hatch
U.S. Senate
Washington, D.C. 20510

Dear Senator Hatch:

Citizens for Educational Freedom is a non-partisan, non-sectarian organization representing parents and other groups concerned with parents' rights in education, especially with their right to choose the kind of education they want for their children.

Our objection to the new Civil Rights Act of 1984 has nothing to do with civil rights, which we strongly support for others as diligently as we pursue it for ourselves. It does, however, have everything to do with what we perceive as overkill, similar to an attempt to kill a rogue elephant with an MX missile.

If the purpose of this legislation is to correct the decision of the Supreme Court in the Grove City College case so that Title IX of the Civil Rights Act of 1964 will apply to an entire college or university, then all that is necessary is that the language which has caused the confusion, namely "activities and programs" of a college be changed to read "the entire college or university". It would be a relatively simple matter.

But rather than deal directly with the problem at hand, this legislation redefines a "recipient" of Federal funds and it does so in such a broad way as to include just about everyone in the United States, from the independent truck driver who delivers federally subsidized milk to the local public school, to the owners of a "Mom and Pop" grocery store that accepts food stamps.

We know that it is not the intent of this legislation to be so all encompassing, but the words are there, and they would be pretty hard to argue down in a court of law, a place where more and more Americans are finding themselves these days.

As people who are already concerned about the continued encroachment of government into the everyday lives of its citizens, we are most concerned with the overkill of this piece of legislation. We therefore urge you to look at it not just with your civil rights eyes, but with your farsighted eyes that can see beyond the good that you wish to accomplish to what you are actually doing toward expanding the reach of this government far beyond what is needed, desired, or good for the civil rights of all our citizens.

Sincerely,

Sister Renee Oliver

Sister Renee Oliver
Associate Director

CEF a non-sectarian, non-partisan national organization of citizens and supporting groups dedicated to parents' rights, liberty and justice for all in education.

THE GENERAL COUNCIL OF WORKSHOPS FOR THE BLIND

Reply to: 7810 S. Dixie Highway
W. Palm Beach, FL 33405
(305) 586-5600

June 14, 1984

The Honorable Orrin G. Hatch
U.S. Senate
135 Russell Office Bldg.
Washington, DC 20510

Dear Senator Hatch:

As a member of the Senate Committee on Labor and Human Resources, you are presently considering the "Civil Rights Act of 1984," S.2568. We understand the House has already marked up its companion bill, HR 5490, and you are urged to complete action on this important legislation by reporting it out without amendments. The General Council of Workshops for the Blind is an association of 100 sheltered workshops employing 5,500 blind persons. In convention in May 1984 a resolution was adopted (copy enclosed) in support of this legislation with emphasis on the fact that it does not improve upon existing civil rights laws but only brings them back to their original interpretation prior to the Supreme Court's Grove City College decision, which had substantially weakened those protections.

Your consideration of our position will certainly be appreciated.

Sincerely,

GENERAL COUNCIL OF WORKSHOPS
FOR THE BLIND

W S Thompson

WILLIAM S. THOMPSON, CHAIRMAN
LEGISLATIVE COMMITTEE

WST:sl
Encl.

WORKING FOR REHABILITATION AND EMPLOYMENT OF THE BLIND

RUSH!

Executive Memorandum

The Heritage Foundation 214 Massachusetts Avenue N.E. Washington, D.C. 20002 (202)546-4400

8/1/84 Number 60

CIVIL RIGHTS BILL: CONGRESS MUST SAY WHAT IT MEANS

Congress unquestionably has the right to pass legislation clarifying its intent in civil rights enforcement, if members of Congress feel the Supreme Court's Grove City decision earlier this year flies in the face of that intent. Recent history is replete with examples of badly or ambiguously written legislation which the courts have interpreted in a manner in conflict with congressional intent.

The proposed Civil Rights Act of 1984, regrettably, in attempting to clarify certain aspects of civil rights law, is certain, as currently worded, to create more confusion than it resolves. Congress has a responsibility to write laws that express its intent unambiguously.

Numerous witnesses at congressional hearings, including Justice Department and Civil Rights Commission spokesmen, have raised a number of questions regarding the proposed law which Congress has thus far failed to resolve. If Congress doesn't, the courts will. It would be far less burdensome to society if Congress amended the bills (H.R.5490, S.2568) before them now. The question naturally arises whether the haste in pushing through the bills as currently worded is motivated primarily by a concern for civil rights or election-year grandstanding.

The Civil Rights Act of 1984 amends four existing civil rights statutes: Title IX of the Education Amendments of 1972 (sex discrimination), Title VI of the Civil Rights Act of 1964 (race discrimination), Section 504 of the Rehabilitation Act of 1973 (handicap discrimination), and the Age Discrimination Act of 1975 (age discrimination). The Supreme Court has interpreted current law to mean that federal civil rights enforcement jurisdiction only extends to the program or activity actually receiving federal aid. In the proposed law, sponsoring congressmen apparently want to express their intent to extend such coverage to the entire institution or entity of which the program or activity is a part.

The problem is that the bills seem not only to do this, but to extend the scope of coverage far more widely than was presumed to exist--even before the Grove City decision. In effect, the bill would authorize federal agencies and courts to exercise unprecedented power over recipients of federal aid. If this is intentional, it should be made explicit. If not, the wording should be changed.

The bill contains a number of ambiguities. The definition of "recipient" of federal aid, for example, although based on present regulatory definitions, goes beyond them. Federal jurisdiction would be extended not only to the institution or entity conducting a federally assisted program or activity--the bill's alleged intent--but also to all

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Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

activities of any entity of which that institution can be considered a subunit. A grant to a town fire department would thus put all other town departments and activities under federal purview even if that town received no other federal aid. (Neither "subunit" nor "entity" is defined in the legislation).

Moreover, a "recipient" according to the bill would not only be a direct recipient of aid but also "any successor, assignee or transferee" of any entity receiving federal aid, either "directly or through another entity or a person." A grocery store accepting food stamps could be said to be receiving federal benefits "through another person" much as a university benefits from tuition paid by a student receiving federal assistance, which the Grove City decision has already determined constitutes aid to the university. Would the proposed law mean "mom-and-pop" groceries would have to install wheelchair ramps and file affirmative action reports? If the grocery's food stamp earnings are used to pay the owner's children's school tuition, is the school a "successor, assignee or transferree" of federal aid? What does this do to the basic legal and economic principle of the fungibility of money?

It is not enough for supporters of H.R.4590/S.2568 to argue that these ambiguities would not be pursued to such ridiculous extremes. Certainly no responsible government agency would do so of its own initiative (nor would it have the funding or staffing to do so). But private parties' ability to pursue such interpretations through the court system almost guarantees a plethora of lawsuits. It is not reassuring that the explicit exclusion from coverage in existing regulations to "ultimate beneficiaries" of federal aid is not part of this legislation's definition of "recipient."

Enforcement is another area where the bill seems to broaden federal powers. Current fund termination provisions are so-called "pinpoint" provisions--they limit fund termination to the particular activity or program evidencing discrimination. The proposed bill provides for termination of all assistance "which supports" the discrimination. "Supports" is not defined, and arguably, federal aid to a non-discriminatory program within an entity can be construed as "supporting" another, discriminatory program because it freed up the entity's resources for the latter activity. Is this broadening of present enforcement powers intentional? These are just a few of the unresolved questions.

Congress, moreover, should consider the philosophical implications of the Civil Rights Act of 1984. The regulatory burden of policing even institutions which do not receive federal funds, do not discriminate and where no discrimination has been alleged entails social and economic costs. It is also a punitive administrative headache for the institutions, for no reason other than that they are presumed guilty until proven innocent. For these and other reasons, Congress should go slowly in acting on this bill to ensure that the law clearly says what Congress intends.

S. Anna Kondratas
Policy Analyst

For further information:

"A Pyrrhic Victory?" Education Update, Spring, 1984, pp. 8-9.
Linda Chavez, Staff Director, U.S. Commission on Civil Rights, Testimony before the Senate Judiciary Subcommittee on the Constitution, May 30, 1984.

**Industrial
Union
Department
AFL-CIO**

Howard D. Samuel, President
Elmer Chatak, Secretary-Treasurer

815 16th Street N.W.
Washington, D.C. 20006
202/842-7800

August 2, 1984

Dear Senator:

The Industrial Union Department, AFL-CIO, strongly urges your support of S. 2568, the proposed Civil Rights Act of 1984. This bipartisan legislation will ensure the preservation of our national civil rights laws as enacted by Congress.

S. 2568 would prevent the Supreme Court decision in the Grove City College case from resulting in the erosion of federal statutes prohibiting discrimination on the basis of race (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendment of 1972), disability (Section 504 of the 1973 Rehabilitation Act) and age (Age Discrimination Act of 1975).

Unless reversed by legislative action, the Supreme Court decision in Grove City significantly weakens federal civil rights statutes and enforcement programs.

Already 63 Senators have cosponsored S. 2568, and it is our understanding the bill will soon come to the Senate floor. We urge you to support the bill and to oppose any weakening amendments.

Sincerely,

Brian Turner

Howard D. Samuel
President

Brian Turner
Director of Legislation

Vice Presidents

Owen Bieber • Kenneth T. Blaylock • Kenneth J. Brown • William H. Bywater • Patrick J. Campbell • Sol C. Chaikin • Dominick D'Ambrosio • Wayne E. Glenn • James E. Hatfield • Keith Johnson • William G. Lindner • William Lucy • Frank D. Martino • Joseph M. Misbrener • Charles H. Pillard • Albert Shanker • Jack Sheinkman • Milan Stone • John J. Sweeney • J. C. Turner • Glenn E. Watts • Lynn R. Williams • William W. Winpisinger • William H. Wynn

Jewish War Veterans of the United States of America
1712 New Hampshire Avenue, N.W., Washington, D.C. 20009

0684056NX
August 8, 1984

The Honorable Orrin G Hatch
SR-135 Senate Office Bldg
Washington, DC 20510

Dear Mr. Hatch:

The Jewish War Veterans of the USA has consistently supported legislation that protects the civil rights of all Americans. Long ago, we learned that denial of the rights of one minority leads inevitably to the denial of such rights to others and finally to the disintegration of democratic freedom itself. It is in this spirit that the Jewish War Veterans of the USA urge you to support S.2568, the Civil Rights Act of 1984.

As I'm sure you're aware, the legislation was introduced in response to the Supreme Court's decision in Grove City College v. Bell. Under this decision the court ruled that, in an educational institution, only a specific program or activity receiving federal financial aid is covered by Title IX, which prohibits sex discrimination in education. Furthermore, this ruling will also be applied to three other civil rights statutes that use identical language to Title IX. This decision clearly undermines the original intent of Congress and effectively weakens Title IX; along with the other three civil rights statutes, as a tool for enforcing anti-discrimination laws. Therefore, this legislative response seeks to restore, not expand, the application of Title IX, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title IX of the Civil Rights Act of 1964 to institution-wide coverage.

We support this legislation because these four civil rights statutes represent our nation's commitment to women, the elderly, minorities, and the handicapped which states: We will not use federal aid to reward any person or group that discriminates on the basis of sex, race, age or the physical limitations of another person. The Jewish War Veterans of the USA urges you to reaffirm this commitment by lending your active support to the Civil Rights Act of 1984.

Sincerely,

Joseph Zoldan

Joseph Zoldan
National Commander

Mexican American
Legal Defense
and Educational Fund

1701 18th Street, N.W.
Washington, D.C. 20009
(202) 393-5111

MALDEF

August 1, 1984

Honorable Orrin G. Hatch
U.S. Senate
Washington, D.C. 20510

Dear Senator Hatch:

The Mexican American Legal Defense and Educational Fund urges you to support passage of S. 2568, the Civil Rights Act of 1984.

As you are no doubt aware, the companion bill H.R. 5490 passed the House on June 27, 1984 by an overwhelming vote of 375 for and 32 against. MALDEF is encouraged that this strong bipartisan commitment in the House will be repeated on the Senate floor very soon.

We ask that you support this vital Civil Rights legislation without substantive amendments, since its purpose is simply to restate the original congressional intent in the enforcement of civil rights statutes before Grove City v. Bell decision.

Again, thank you for your support.

Sincerely,

Helen C. Gonzales

Helen C. Gonzales
Associate Counsel

HCG:AB:mv

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NATIONAL
ASSOCIATION
of
COUNTIES

440 First St. NW, Washington, DC 20001
202/393-6226

June 11, 1984

The Honorable Orrin Hatch
United States Senate
Labor and Human Resources Committee
SD-428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

The National Association of Counties remains firmly committed to strong civil rights legislation. For this reason, we urge the committee to move swiftly and prudently in considering the Civil Rights Act of 1984 (S. 2568). The intent of the bill is to restore the original force and coverage of the civil rights laws in wake of the Supreme Court's decision in Grove City v. Bell.

While we support the intent of the bill, we are concerned that the proposed legislation may extend the force and coverage of the civil rights laws far beyond their original scope. Moreover, we are concerned that it may subject counties to unreasonable federal scrutiny and administrative burdens.

During a May 30 Senate Judiciary Subcommittee hearing on the bill, former Harvard Law professor Charles Fried testified that ..."The effect of Section 5 of S. 2568 would be to subject every single activity of state or local governments to the supervision of every federal agency which disburses any money to any part of such a state or local government entity." He further stated that ..."Congress would be subjecting every single state and local government activity to multiple reporting requirements and expanded anti-discrimination scrutiny." The fact that several other legal experts joined Mr. Fried in this interpretation of the bill is of grave concern to us.

We urge the committee to redraft the legislation with clearer language so as to avoid the above interpretation. In redrafting the bill, the scope of the civil rights laws should be clarified so as not to exceed their original force and coverage.

If you have any questions or if we can assist you in any way, please contact Larry Jones of my staff.

Sincerely,

Matthew B. Coffey
Executive Director

AMERICA'S COUNTIES

NAM
National Association
of Manufacturers

RANDOLPH M. HALE
*Vice President and Manager
Industrial Relations Department*

July 31, 1984

The Hon. Orrin G. Hatch
Chairman
Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The National Association of Manufacturers, an organization of over 13,600 manufacturers would like to take this opportunity to express opposition to S. 2568, the Civil Rights Act, in its current form. We believe the focus of this legislation should be on Title IX of the Educational Act Amendments of 1972.

Proponents of this legislation have insisted that the bill only constitutes a reversal of the February 28, 1984 Supreme Court decision in Grove City College v. Bell. The NAM believes S. 2568 would make major changes in our antidiscrimination laws that will affect private employers on all levels and result in a monumental increase in litigation and regulation.

In Grove City, the Court found that the nondiscrimination provision of Title IX of the 1972 Educational Act Amendments applied only to a program receiving federal funds and not the whole university. S. 2568 would reverse this holding, and would extend not only Title IX but also the 1964 Civil Rights Act, the 1973 Rehabilitation Act and the Age Discrimination Act of 1975 to any "recipient" of federal aid. The definition of "recipient" in the bill is particularly vexing as it would subject private employers to statutory coverage for even the most indirect contact with federal assistance programs.

The NAM opposes discrimination, in any form or however manifested. Furthermore, we support efforts to remedy the program specific limitations decided in Grove City. We believe that S. 2568 goes far beyond that ideal. This legislation would unnecessarily extend federal authority and its accompaning regulatory burden to the private sector, where employers would then face a confusing multi agency enforcement scheme .

For these reasons, as your Committee begins markup, we urge you to limit the scope of S. 2568 to Title IX of the 1972 Educational Act Amendments. It would thus effecutuate a reversal of the Grove City decision without unnecessarily extending federal authority into the private sector.

Thank you for your consideration of our views.

Sincerely,

1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3700

ncwge National Coalition for Women and Girls in Education

c/o National Education Association, Human and Civil Rights
1201 Sixteenth Street, N.W., Washington, D.C. 20036 (202) 822-7715

August 2, 1984

Dear Senator:

The National Coalition for Women and Girls in Education urges your support of S. 2568, the Civil Rights Act of 1984, which was drafted in response to the Supreme Court's decision in Grove City College v. Bell. The Coalition strongly supports S. 2568 and its swift passage through Congress.

The Coalition is a federation of 50 national women's, educational, and civic organizations that work to promote federal policies that advance equal education opportunity for girls, boys, men, and women in this country. Since 1975 the Coalition has worked with the Congress and the various administrations to attain equity between the sexes in American schools.

The major focus of the Coalition has been the preservation and enforcement of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in education. The Court's decision in Grove City substantially narrowed Title IX and leaves enforcement of the law in a state of flux. In addition, the decision is potentially damaging to Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975.

The National Coalition for Women and Girls in Education believes that prompt congressional action is needed to overcome the effects of this case. We strongly support S. 2568, sponsored by Senators Edward Kennedy, Bob Packwood and Robert Dole. The Coalition believes that S. 2568 will restore Title IX to the broad scope and coverage that was originally intended by Congress and leave unquestioned the breadth and scope of coverage of Title VI, Section 504 and the Age Discrimination Act.

We urge you to support S. 2568 without substantive amendments and we urge your support in ensuring its expeditious passage.

Sincerely yours,

Barbara A. Stein

Barbara A. Stein
Chair, NCWGE

BAS/ds

NFIB National Federation of Independent Business

The Guardian of Small Business

June 12, 1984

Wilson S. Johnson
Chairman of the Board and Director
National Federation
of Independent Business

John E. Sloan, Jr.
President, Chief Executive Officer and Director
National Federation
of Independent Business

Frank M. Cruger
Vice President and Director
Indiana Manufacturers
Supply Co., Inc.
Indianapolis, Indiana

Bruno J. Mauer
Vice President and Director
Iucken Industrial Supply
Milwaukee, Wisconsin

Bruce G. Fielding, CPA
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Lucy A. Fontenot
Assistant Secretary
National Federation
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Ted L. Kuchenriter, CPA
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Ramon E. Billeaud
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J. B. Leven Land Co.
New Orleans, Louisiana

Richard S. Briggs
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Integrated Handling Systems
Menlo Park, California

Jerry J. Chicone, Jr.
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Chicone Groves Properties
Orlando, Florida

James S. Herr
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Herr's Potato Chips, Inc.
Nottingham, Pennsylvania

H. H. (Larry) Larson
Director
Columbia Paint Co.
Spokane, Washington

Gordon L. Stone
Director
Stonehouse Signs, Inc.
Arvada, Colorado

Dick Fisher, CAE
[illegible]
National Federation
of Independent Business

Federal Legislative Office
600 Maryland Avenue, S.W.
Washington, D.C. 20024
[illegible]

Honorable Orrin G. Hatch, Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the one-half-million small business owner-members of the National Federation of Independent Business (NFIB), I am writing to request that the Senate Labor Committee hold further hearings on S. 2568, the Civil Right Act of 1984. With the press of other business it has only just come to our attention that this legislation may have wide reaching affects on the nation's small businesses.

While I am not yet prepared to state any firm conclusions, enough questions have been raised concerning the intent and reach of S. 2568 that I believe America's entrepreneur's deserve a chance to thoroughly consider it. I, therefore, urge you to hold further hearings on the issue, with particular focus on its effects on the operating practices of the small business community.

Sincerely,

John

John J. Motley, III
Director of Federal Legislation

JJM:jz
531m

National Governors' Association

James R. Thompson
Governor of Illinois
Chairman

Raymond C. Scheppach
Executive Director

June 12, 1984

The Honorable Orrin G. Hatch, Chairman
Senate Subcommittee on the Constitution
Committee on the Judiciary
SD-212 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

The nation's governors are strongly committed to effective civil rights laws both nationally and in the individual states. We have always supported congressional efforts to strengthen and improve civil rights laws as in the general revenue sharing program.

The NGA has not been able to review the myriad of issues raised by the proposed Civil Rights Act of 1984 due to the rapid pace which this legislation has assumed in Congress.

Conflicting testimony by many witnesses has raised new questions of scope, coverage, definitions, compliance and enforcement. Since the proposed legislation would seem to cover all activities of all direct and indirect recipients of federal aid, the intergovernmental management implications for state and local government would be substantial. It is also unclear how the proposed changes would affect the local general revenue sharing program and state and local government block grants.

The congressional committees have raised many questions. Answers to these questions, and clarification of the ambiguities involved, are essential for the thousands of large and small governments in the United States that wish to comply with and enforce the nation's civil rights laws. To be workable and enforceable at the bottom, the policy must be clear at the top.

On behalf of the nation's governors, I hope your Committee could provide us with some clarifications of the proposed legislation's impact prior to final committee and congressional action.

Sincerely,

James R. Thompson

Governor James R. Thompson

HALL OF THE STATES · 444 North Capitol Street · Washington, D.C. 20001 · (202) 624-5300

NATIONAL GROCERS ASSOCIATION

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Reston, Virginia 22090
(703) 437-5300
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1910 K Street, N.W., Suite 700
Washington, D.C. 20006
(202) 955-8400

August 1, 1984

The Honorable Orrin G. Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This letter is in regards to S. 2568, which is designed to reverse the effects of the recent Supreme Court decision in Grove City College vs. Bell. On behalf of the National Grocers Association, I wish to express some concerns raised by the unnecessarily broad scope of the legislation.

N.G.A. is the national trade association representing the small business sector of the retail and wholesale food distribution industry. Its members include 1,600 independent retail grocers, 66 retailer-owned distribution centers, and 57 state and local associations.

While the association supports the objective of S. 2568 -- to expand the application of federal civil rights laws from a specific federally-funded program, which was affirmed by the Supreme Court in Grove City, to the educational institution receiving federal monies for its program(s) -- S. 2568 would amend four civil rights statutes prohibiting discrimination based upon sex, race, age, and handicaps by deleting the reference to "program or activity" and replace it with an expansive definition of "recipient."

Several federal agencies have stated this amendment goes far beyond the bill's intended purpose of reversing the Grove City decision and may arguably apply to new categories of direct and indirect recipients of federal assistance in a manner never contemplated or intended by Congress. The Civil Rights Division of the Department of Justice fears that the broad language of S. 2568 "could be construed so that federal food stamp programs would subject participating supermarkets and local grocery stores to federal civil rights compliance reviews and complaint investigations." Moreover, the General Counsel for the U.S. Department of Agriculture is concerned that "if S. 2568 is enacted in its present form, it could so broaden the reach of the federal laws regarding discrimination, that it would make them applicable in a manner that has never been contemplated, . . . to recipients of Federal loans and grants."

Both of these examples would affect N.G.A. members, who are integral participants in the food stamp program and who are also are eligible for commercial loans guaranteed by the Small Business Administration. Current requirements in these programs already impose sufficient regulatory controls and compliance requirements.

In conclusion, S. 2568, as currently drafted, goes beyond its intended purpose and raises serious questions about its effect on our nation's independent retail grocers and their wholesalers. For these reasons, N.G.A. suggests that S. 2568 be amended to define more precisely the scope and application of federal civil rights laws.

Sincerely,

Thomas F. Wenning
Executive Vice President
and General Counsel

National Organization for Women, Inc.
425 13th Street, N.W. Suite 723 Washington, D.C. 20004 • (202) 347-2279

June 4, 1984

Senator Orrin Hatch
United States Senate
Washington, DC 20510

Dear Senator Hatch:

As you know, legislation to reaffirm several civil rights statutes threatened by the Supreme Court decision in Grove City College v. Bell is under consideration by the Labor and Human Resources and Judiciary committees.

The proposed legislation is a crucial response to the Court's decision to narrow the prohibition against sex discrimination in federally-assisted programs contained in Title IX of the Education Amendments of 1972. Title IX was based on Title VI of the Civil Rights Act of 1964, as were Section 504 of the 1973 Rehabilitation Act and the Age Discrimination Act of 1975. All four of these statutes contain similar language and, thus, all four are similarly jeopardized by the Court's holding.

The proposed bill (S. 2568) is a reaffirmation -- not an expansion -- of current law which is backed by a massive civil rights coalition composed of women's rights, civil rights, aging, labor, disabled, education, youth and religious advocacy groups. This coalition strongly supports the legislation as introduced in both the House of Representatives and the Senate with no amendments. We are pleased that both the Judiciary Committee and the Education and Labor Committee in the House of Representatives reported the companion bill (HR 5490) out of committee with no amendments to the original language of the bill.

As a concerned legislator, you understand that quick action on the proposed bill is vital to eliminate discrimination in federally-assisted programs and to protect the rights of millions of Americans.

Thank you in advance for your support for this measure.

Sincerely,

Mary Jean Collins

Mary Jean Collins
Vice President - Action

EMILY R. AND KIVIE KAPLAN BUILDING
2027 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 387-2800

religious action center
Commission on Social Action of Reform Judaism

Co Director: ALBERT VORSPAN
Co-Director & Counsel:
RABBI DAVID SAPERSTEIN

July 25, 1984

Dear Senator,

I am writing on behalf of the Union of American Hebrew Congregations to express our strong desire for your support of the Civil Rights Act of 1984, scheduled for mark-up in the Labor and Human Resources Committee. The overwhelming victory of this bill in the House of Representatives on June 26 reflected that body's commitment to justice and to the eradication of discrimination. We call upon you as a member of the mark-up committee to respond with equal fervor to this crucial civil rights bill.

As you know, the Supreme Court's unprecedented interpretation of Title IX of the 1972 Education Act Amendments in Grove City College vs. Bell has undermined Congress' original intention to prohibit discrimination in federally funded educational institutions . Six Supreme Court Justices interpreted the "program or activity" language narrowly so that only the specific departments receiving federal aid are subject to Title IX discrimination prohibitions.

The same restrictive interpretation of three other major civil rights laws (Title VI of the Civil Rights Act of 1964, Section 504 of the 1973 Rehabilitation Act, and the Age Discrimination Act of 1975) is possible because of their similar use of "program or activity" language. The Civil Rights Act of 1984, by amending this language will clarify the original intent of Congress in all four pieces of legislation: that receipt of any federal funds will result in the prohibition of discrimination institution-wide, as opposed to prohibition of discrimination in just the specific program or activity receiving federal aid.

Concerns that this legislation will expand coverage of these laws, or that a flood of litigations will ensue are entirely unfounded. Some seventy witnesses in ten days of hearings testified in support of S. 2568--including eight former high-ranking Executive Branch officials from the Johnson, Nixon, Ford, and Carter Administrations who were responsible for enforcing our civil rights laws for almost two decades. These officials testified that S. 2568 would simply restore the four principle civil rights statutes to their previous scope and coverage and that the measure would make no changes in substantive laws. The Civil Rights Act of 1984 will restore the status quo prior to the significant limitation of civil rights ushered in by Grove City.

The fate of our four principle civil rights statutes hangs in the balance. The UAHC is committed to the elimination of the discrimination that irrefutably exists in our country. This bipartisan legislation is an opportunity for members of Congress to affirm and reiterate their commitment to eradicate discrimination. Time is of the essence--several Title IX investigations have been closed in mid-stream as a result of Grove City. We urge you to raise your voice in support of S. 2568 without substantive amendments.

Rabbi David Saperstein
Co-Director, Religious
Action Center, UAHC

The Religious Action Center is under the auspices of the Commission on Social Action of Reform Judaism, a joint instrumentality of the CENTRAL CONFERENCE OF AMERICAN RABBIS and the UNION OF AMERICAN HEBREW CONGREGATIONS with its affiliates – National Federation of Temple Sisterhoods, National Federation of Temple Brotherhoods, National Federation of Temple Youth.
366

UNITED STATES CATHOLIC CONFERENCE

1312 MASSACHUSETTS AVENUE, N.W. • WASHINGTON, D.C. 20005

MOST REVEREND JAMES W. MALONE, D.D.
BISHOP OF YOUNGSTOWN
President

REVEREND MONSIGNOR DANIEL F. HOYE
General Secretary

REVEREND RONALD C. ANDERSON
REVEREND DONALD E. HEINTSCHEL
MR. FRANCIS X. DOYLE, JR.
Associate General Secretaries

June 11, 1984

Hon. Orrin Hatch, Chairman
Senate Committee on Labor and
 Human Resources
Room 428, Dirksen Office Building
Washington, D. C. 20510

Dear Senator Hatch:

I am writing to express the strong support of the United States Catholic Conference for the principles of non-discrimination incorporated in S. 2568, the Civil Rights Act of 1984. The passage of this legislation is of central significance for it deals with the very heart of the civil rights protections which have been enacted over the last twenty years. These civil rights laws have done a great deal to root out discrimination in our society and to protect the basic rights of millions of Americans. To permit that legacy to be eroded would be a tragic mistake.

The Catholic tradition defines the human person as "the image of God"; each person has a unique dignity which in turn is the basis for a spectrum of human rights, moral claims which protect and promote the dignity of each person in society. In light of the equal dignity each person possesses, discrimination based on race, ethnicity, sex, age or physical condition is a violation of the moral law which in turn should be the foundation of our constitutional and civil laws. Because discrimination is a direct assault on the dignity of the person, the Catholic Church, in cooperation with the other religious communities of our country, has been proud to be part of the struggle for human and civil rights. It is on the basis of both our moral principles and our past experience in the civil rights arena that we address the Civil Rights Act of 1984.

The decision of the Supreme Court in Grove City College v. Bell, 104 S. 1211 (1984), has made it necessary for Congress to amend the four major federal laws prohibiting discrimination by recipients of federal funds. By amending Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Section 504 of the Rehabilitation Act of 1973; and the Age Discrimination Act of 1975, the Civil Rights Act of 1984 is consistent with the broad coverage that marked the enforcement of these civil rights laws prior to the Grove City decision.

We wish to address a specific part of S. 2568 which we believe requires clarification. The definition of "recipient" in S. 2568 is unclear and could extend the reach of the four statutes to an organization which itself does not receive federal financial assistance. As defined, a recipient includes any private organization "which receives support from the extension of federal financial assistance to any of its subunits." "Subunit" is not defined, nor is it clear when an organization "receives support from the extension of federal financial assistance." Does the bill contemplate only the situation in which a subunit remits federal financial assistance (e.g., funds) to a parent organization, or does it contemplate as well the situation in which a subunit which receives federal assistance provides support to its parent organization from non-federal sources?

If the latter, it would seem that a diocese which receives support from a parish whose school receives a federal energy conservation grant could be considered a "recipient" even though in fact it (the diocese) receives none of the grant funds. Status as a "recipient" might then be construed as requiring the diocese to comply with various administrative regulations and subjecting it to governmental investigations into its various programs and activities. A diocese which is a corporation sole presents particular concerns. In short, an unnecessarily broad interpretation of the term "recipient" could lead to unwarranted governmental intrusion into the internal affairs of religious organizations. We therefore ask that the definition of recipient in S. 2568 be confined to organizations which actually receive federal financial assistance directly or through any subunit or other source.

Precisely because this legislation deals with human and civil rights we also wish to reiterate here our broader concern with the way in which Title IX regulations require educational institutions receiving federal financial assistance to treat abortion in the same fashion as other temporary disabilities for the purposes of student and employee leave and health policies. We recognize that S. 2568 is not directly concerned with dealing with this larger issue of Title IX, but we wish to be on record repeating our concern about this matter.

In summary, we want the Committee to know of our support for the civil rights intent of S. 2568 and our conviction that the definition of "recipient" requires clarification.

Sincerely yours,

Daniel F. Hoye

Msgr. Daniel F. Hoye
General Secretary

UTAH HOSPITAL ASSOCIATION

Carolyn N. Eklund, Esq.
Vice President
Legal & Adminstrative Service

515 South Seventh East Suite 2-F
Salt Lake City, Utah 84102
364-1515

July 11, 1984

The Honorable Orrin G. Hatch
United States Senate
125 Russell Senate Office Building
Washington, D.C. 20510

RE: S.2568 - The Civil Rights Act of 1984

Dear Senator Hatch:

The Utah Hospital Association has been informed that S.2568 is scheduled for mark-up in your committee on Labor and Human Resources on July 25, 1984. This bill was introduced with the limited intention of overturning the Supreme Court's recent decision in Grove City College v. Bell 104 S.Ct. 1211 (1984), which held that discrimination provision of Title IV of the Education Amendments of 1972 was program specific. Three other statutes (Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964) contain the same language. S.2568 and its counterpart H.R. 5490 would amend all four statutes by replacing their references to "programs and activities receiving" federal financial assistance with the term "recipient". That term is very broadly designed and the enforcement scope of the statutes is expanded.

Utah hospitals are concerned that in focusing on the legislative repeal of Grove City, the drafters of the bill were confused over what is a covered entity. The difficulties in the bill can only be resolved if Congress clarifies what constitutes "federal financial assistance".

Utah hospitals are also concerned with the expanded enforcement thrust because the termination of funds beyond the discriminating program or activity threatens to contradict the fundamental purposes of both the civil rights laws and medical treatment itself. It can not (or at least should not) be the intent to extend penalties in such a way that the actual target becomes the patient who is the true recipient and beneficiary of federal assistance.

The definition of recipient is claimed to be derived from existing regulatory definitions, but it is a great deal broader. Under current regulations "recipients" are covered only in their funded "programs and activities" and not in their entireties, as is now proposed. Also indirect coverage is expanded immensely by the addition of a clause "including entities which receive support from the extension of federal financial assistance to any of their subunits", and deletion of the exemption for "ultimate beneficiaries".

Because the term "recipient" is central to the legislative repeal of Grove City and its program-specific limitation, the Utah Hospital Association suggests clarifying or limiting its definition. Further, S.2568 does not define "federal financial assistance". Thus if the bill were enacted, without amendment, we would be left with an overly broad category of affected "recipients" and entities which receive federal financial assistance. Law and reason suggest that hospitals that receive payment through Medicare or Medicaid (reimbursement for services rendered) should not be held to have received federal financial assistance Cook v. Budget Rent-A-Car Corp. 502 F. Supp. 494 (S.D.N.Y. 1980). Neither Medicare nor Medicaid pays more than a predetermined amount which was set at a rate to compensate an efficient hospital. Such payments are typically less than actual hospital costs. To the extent that assistance flows in any direction, it flows from hospitals to the government or to the Medicare of Medicaid beneficiaries.

The Utah Hospital Association on behalf of its member hospitals needs your help in amending the bill so that it does not have unintended overreaching results that are unfair to both the recipients or the hospitals.

Sincerely,

Carolyn N. Eklund

Carolyn N. Eklund
Vice President

CNE/jb

cc: Howard Matthews
Committee of Health and Human Resources

Nancy Taylor
Committee on Labor and Human Resouces

Steve Grossman, Administrative Assistant
Senator Orrin Hatch

WEAL
Women's Equity Action League

Specialists in Women's Economic Issues

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June 7, 1984

Senator Orrin G. Hatch
135 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

On June 13, the Senate Labor and Human Resources Committee will be marking up "The Civil Rights Act of 1984," S. 2568. Women's Equity Action League urges you, as a key member of the committee, to vote YES in support of this important legislation. It is important that this "legislative response to Grove City" pass swiftly. WEAL also encourages you to look closely at any proposed amendments and vote against those that weaken the intent of the legislation.

The February 1984 Supreme Court decision in Grove City not only set back educational opportunity for women and girls, but also placed in jeopardy statutes dealing with race, the disabled and the aging populations. S. 2568 simply clarifies and restates the comprehensive coverage that was originally intended by Congress in Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

S. 2568 has strong bi-partisan support, including 62 Senate co-sponsors.

Thank you for voting YES when the bill comes before your committee.

Sincerely,

Pat Reuss

Patricia Blau Reuss
Legislative Director

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

June 20 1984

The Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D. C.   20510

Dear Mr. Chairman:

On May 29, 1984, you wrote to me requesting comments on the manner in which S. 2568, entitled the "Civil Rights Act of 1984," would affect the administration of this Department's programs, and on the enforcement aspects of the measure as well. S. 2568 has been introduced in response to the Supreme Court's decision in Grove City College v. Bell, 104 S. Ct. 1211 (1984).

As indicated by Daniel Oliver, General Counsel of this Department, in his letter of June 8, 1984, to the Honorable Jesse Helms and in his testimony before the Senate Committee on Agriculture, Nutrition, and Forestry on June 12, 1984, the Department of Agriculture is committed to vigorous enforcement of Federal civil rights laws. However, we are concerned that if S. 2568 is enacted in its present form, it could so broaden the reach of the Federal laws regarding discrimination that it would make them applicable to over 2,000,000 individual farmers who are recipients of Federal loans and grants under programs administered by this Department.

Currently the anti-discrimination statutes prohibit discrimination in a "program or activity" receiving Federal financial assistance. Also, our regulations exempt "ultimate beneficiaries" from the definition of recipient. S. 2568 would remove the "program or activity" concept from the statute, and would seem to remove the exemption for ultimate beneficiaries. S. 2568 also greatly broadens the definition of recipient. We believe that S. 2568 would very likely effect a major transformation in the Federal anti-discrimination laws by making them applicable to farmers and the people they do business with, and would impose an enormous enforcement burden on this Department.

There are three principal categories of Departmental programs under which we believe recipients would be most directly affected if S. 2568 were enacted: farm price supports loans, loans made by the Farmers Home Administration, and Federal crop insurance programs.

Because farmers who receive Federal price support loans on their commodities are not themselves involved in a "program or activity receiving Federal financial assistance" and because they are ultimate beneficiaries of the programs involved, those farmers are not now deemed to be subject to the Federal anti-discrimination laws. If S. 2568 were to be enacted in its present form, however, we believe that farmers who receive price support loans would come within the reach of those laws. More than 2,000,000 producers received price support loans last year.

Recipients of loans made by the Farmers Home Administration could likewise be covered by Federal anti-discrimination laws if S. 2568 were enacted in its present form. This would include recipients of farm operating loans, farm real estate loans, disaster loans, and loans made for other purposes such as rural housing and business and industry loans. While the anti-discrimination laws do not currently apply to farmers and others who receive loans directly from the Farmers Home Administration, we believe such recipients could be covered by those laws if S. 2568 became law. In fiscal year 1983, approximately 145,000 loans were made directly to such recipients by the Farmers Home Administration.

The situation would be the same for producers receiving assistance in the form of premium subsidies under the Federal crop insurance programs. Like recipients of Federal loans, producers who purchase subsidized crop insurance are not now covered by Federal anti-discrimination laws because they are not involved in a program or activity receiving Federal financial assistance and because they are ultimate beneficiaries as well. If S. 2568 were to become law, however, such producers could be deemed to be "recipients" of Federal financial assistance. We believe this would be true whether they purchased Federal crop insurance directly from the government or from private insurers participating in the government's reinsurance program. Approximately 225,000 producers purchased subsidized crop insurance under these programs in fiscal year 1983, and approximately 328,000 are expected to do so in fiscal year 1984.

Finally, we would note that the reports of the House Education and Labor Committee and the House Judiciary Committee on this legislation, in regard to whether the Food Stamp Program would trigger coverage, state only that the respective committees "[believe] the Supreme Court adequately addressed this issue in the Grove City College ruling," and then quote a footnote in which the Supreme Court simply noted that receipt of food stamps by students does not trigger coverage of the colleges and universities they attend (see page 31 of the Judiciary Committee's report and pages 31-32 of the Education and Labor Committee's report on the Civil Rights Act of 1984). In so doing, we believe the committees are clearly indicating an intention to cover entities whose involvement in the Food Stamp Program is more substantive and direct.

The language of S. 2568 is broad, vague, and clearly ambiguous. How the proposal would affect the American farmers and the people they do business with -- the American farming industry as a whole -- is far from clear. Such a proposal should not be enacted without the fullest consideration. I therefore recommend that S. 2568 be thoroughly considered for its potential effects on millions of beneficiaries of Federal assistance under programs administered by this Department -- as well as by dozens of other Federal agencies.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Richard E. Lyng

Richard E. Lyng
Acting Secretary

SECTION 3.--MISCELLANEOUS ANALYSES

LABOR POLICY ASSOCIATION, INC.
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June 6, 1984

SPECIAL MEMORANDUM XII-7

RE: The Impact on Private Employers of the Civil Rights Act of 1984, Legislation that Would Reverse the Supreme Court's Decision in Grove City College v. Bell

Status of the Legislation

The House and Senate will soon consider legislation that would greatly expand the reach of federal control of private employment practices and increase the number of agencies that would have jurisdiction to bring EEO enforcement proceedings. (H.R. 5490; S. 2568).

The legislation is intended to reverse the Supreme Court's decision in Grove City College v. Bell which held that the Title IX of the Education Amendments of 1972 (which prohibits sex discrimination in schools) applies only to the particular department of a university that receives federal funds, and not to the entire university. At this time, the legislation appears to be on a very fast track. The House bill was reported out of the Education and Labor and Judiciary Committees by voice vote, and full House action awaits only the issuance of a Committee report. The Senate has scheduled markup of its bill by the Senate Labor & Human Resources Committee for June 13, 1984. Approval is also expected from that Committee.

Significantly, the bills under consideration go far beyond reversing the Grove City decision. There is a common, but erroneous, perception that they apply only to educational institutions and not the private employer community. This perception may be due partly to the fact that the Grove City case involved a university and arose under Title IX of the Education Amendments of 1972 which applies only to educational institutions receiving federal financial assistance. Beyond amending Title IX, however, the proposed legislation would also amend Title VI of the 1964 Civil Rights Act, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 and expand their reach to many private employers not now covered by these statutes. As Senator Packwood, one of the Senate sponsors has stated, this "is a simple bill with global ramifications." Cong. Rec. 4589 (April 12, 1984).

As discussed below, the bill is riddled with ambiguities. While there is no way to predict which interpretations will be followed by federal compliance agencies and plaintiffs' attorneys, the bill as drafted opens the door to broad interpretations. The following memorandum gives background information regarding Grove City and discusses the implications of the legislation for private employers.

The Grove City Case

The Grove City case involved an interpretation of language in Title IX that limited coverage to any education "program or activity" receiving federal financial assistance. The Supreme Court held that tuition payments received by a college from students participating in a federal tuition aid program do not trigger institution-wide coverage of Title IX. The Court found that Title IX's nondiscrimination provision applied only to the college's financial aid office, and not the whole university. True, the proposed legislation would reverse this court holding, but in addition would do much more to public institutions and private employers alike.

Deletion of Program Specificity

The first major change made by the legislation is to modify each statute (Titles VI and IX, Section 504 and the ADA of 1975) by deleting the term "program or activity" and substituting the term "recipient". For example, Section 601 of Title VI would be changed to read:

> No person in the United States shall, on ground of race, color, or national origin be denied benefits, or be subjected to discrimination by any recipient of Federal financial assistance.

As stated by Senator Kennedy, one of its sponsors, "[t]he effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receives federal funds." Cong. Rec. 4586 (April 12, 1984). This is the portion of the legislation that reverses the limited interpretation given Title IX by the Supreme Court in Grove City and makes that change for the other three statutes as well. Significantly, a private employer who received federal funding for a training program would now find that all the company operations would be subject to Title VI, Title IX (if the corporation is deemed to be an "education recipient"), Section 504, and the 1975 Age Discrimination Act.

Expansion of "Recipient" of Federal Funds

The second amendment that this legislation would make in these statutes is sweeping in scope because it greatly expands the definition of federal financial "recipients" who would be covered by the statutes. None of these statutes presently defines the term "recipient", and the definition has been left to agency interpretation. But under the proposed bills, the term recipient includes: any "private agency, institution, or organization or other entity" (1) to which Federal financial assistance is extended, "either directly or through another entity or a person", or (2) which "receives support" from the extension of such financial aid to any of its subunits. One plausible interpretation, and one which its supporters do not deny, is that all operations of any private entity which receives its own federal funds, or recieves such funds indirectly from a direct recipient of federal funds, would be covered by all four statutes.

Three examples will illustrate the scope of this legislation:

1. An entire company will be covered if any part of its operations receives assistance, such as a federally funded training program;

2. A company that sells materials or leases equipment to a federally funded project (for example, highway or bridge construction) might be receiving the federal assistance "through another entity" that receives direct federal aid. If so, the entire operations of the indirect recipient might be covered by the four statutes; and

3. A grocery store or pharmacy might be covered if it accepts food stamps or medicare payments for food or prescriptions.

Sponsors of the legislation readily admit that the first example gives the exact outcome that is intended by the bills. The second example is plausible from a direct application of the language of the new definition of "recipient." The third example is denied by the sponsors of the legislation, but the Department of Justice has argued strenuously that indirect recipients of federal funds (such as grocery stores, pharmacies, landlords, etc.) would come within the new definition. Equally sweeping for the public sector, many have argued that under these bills, if one governmental entity in a state receives any federal funds, the entire state government could be covered.

Multiple Enforcement Agencies

In the past, considerable confusion and duplication of effort has resulted from the fact that discrimination claims against an employer might be investigated or litigated in several different forums (e.g., EEOC; OFCCP; federal suits; state agencies and state private suits; and grievance and arbitration procedures). The problems would be expanded if the pending legislation were enacted. If one or more parts of a private entity (such as a corporation) received federal aid from different funding agencies, or if any branch of a private entity sold or rented goods or services to direct recipients for use on federally-funded projects, any number of federal agencies could have jurisdiction over all the operations of the company. Each agency, in turn, would be able to enforce the four statutes.

This possibility of multiple agency enforcement against direct or indirect recipients raises a strong chance for a replay of the confusion and lack of direction previously faced by federal contractors. Until enforcement was consolidated in the Office of Federal Contract Compliance Programs, each federal contracting agency conducted its own enforcement program. Federal contractors faced different legal standards, depending upon the agency involved.

The problems caused by such multiple jurisdiction include the following:

1. Many agencies do not have the expertise to handle civil rights problems, which are best left to EEOC and OFCCP for enforcement;
2. Confusion of legal standards and agency enforcement practices inevitably results from a lack of a central coordinating authority;
3. Private employers often are subjected to multiple compliance reviews and reporting requirements; and
4. Numerous agencies are available with which an individual can file the same complaints.

To add to the confusion, "[u]nder the bill, the government funding agency may still refer cases of discrimination to the Justice Department, which can sue in the federal courts to stop the discrimination." Statement of Senator Kennedy, Cong. Rec. 4587 (April 12, 1984). The Justice Department would be able to "sue in Federal district court for injunctive and other appropriate relief." Remarks of Senator Cranston, Cong. Rec. 4590 (April 12, 1984). Under present law, the Justice Department has authority only over state and local governments; the EEOC handles cases against private employers.

There presently is confusion, for example, between the Department of Justice and the EEOC on the proper breadth of affirmative action. Recently, the two agencies have disagreed on whether such relief may ever be given to persons who are not victims of proven discrimination. In a recent case involving the New Orleans police department, the EEOC prepared a brief that directly confronted the Justice Department position that such relief is limited to identifiable victims. The EEOC did not file its brief on this issue only because of a determination that EEOC does not have jurisdiction to file in a public sector case. But should the Justice Department obtain Title VI federal funding jurisdiction over private employers, the possiblity of conflicting legal standards is obvious.

Another point of potential confusion is illustrated by past experience with OFCCP, which took the position that it had legal authority to attack seniority systems that were legal under Title VII. Only after losing in court did the OFCCP agree to accept Title VII standards. See United States v. Trucking Management, Inc., 662 F. 2d 36 (D.C. Cir. 1981); United States v. East Texas Motor Freight System, 564 F. 2d 179 (5th Cir. 1977). There could be no assurance that future administrations would abide by the Reagan administration's OFCCP's decision to acquiesce in these decisions except in these two circuits. This raises the spectre of Title VI enforcement (involving race discrimination) that could be contrary to Title VII. While such an agency position would seem to have little legal foundation, that fact alone has not deterred past administrations from pursuing such a course of action.

A further source of confusion could result from the present lack of a government position on the issue of comparable worth. EEOC has resisted investigating sex-based wage discrimination claims alleging that different jobs that are "worth" the same should be paid the same. While the law is developing, there is the possibility of differing enforcement standards under Title IX coming out of federal funding enforcement agencies.

Private Right of Action

Another source of confusion would be the existence of a private right of action to bring federal court suits against federal funds recipients. Title IX and Section 504 already have been construed to permit such a right. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979) (Title X). There is a good chance that Title VI and the Age Discrimination Act of 1975 would have such a right since all four statutes were patterned after one another. As stated by Senator Kennedy, Cong. Rec. 4587 (April 12, 1984), for "each of the four statutes", the bill is intended to preserve "specific portions of case law which confirmed the private rights of action and coverage of employment."

There is, of course, no administrative limit that could be placed on private plaintiffs as far as the legal theories they would pursue. In addition, none of these statutes require the same procedural steps to be taken to process a charge (e.g., timely charge filing, conciliation, and issuance of a right-to-sue letter) as are found in Title VII. There also would not be any bar to private litigants pursuing these private remedies *in addition to* filing charges with EEOC and OFCCP. Moreover, 42 U.S.C. §1988 permits an award of attorneys' fees to prevailing plaintiffs in suits brought under Titles VI and IX.

There is nothing in the legislative history to date that would stop the confusion and multiple enforcement possibilities inherent in this legislation. To the contrary, sponsors of the bill have stressed that each of these laws should be given "broad and comprehensive coverage." Cong. Rec. 4587 (April 12, 1984)(Senator Kennedy). Likewise, Senator Packwood stressed that "our intention has been expansion of the protections of the original Civil Rights Act; this purpose is not served by anything but the broadest interpretations of the laws." (*Id.* at 4589). Without some limitations either in the legislation itself or in legislative colloquies, there is a strong possibility of increased confusion in federal rights enforcement against private employers who already are subject to multiple enforcement proceedings.

CONCLUSION

Private employers who now face the possibility of litigating a single claim of discrimination in several different forums could have this burden increased substantially if the proposed legislation were passed. Any employer who sold goods or performed services for federal funds, or who received payment for services or goods from other federal funds recipients, would be subject to compliance investigations from any number of federal agencies which now do not have jurisdiction under present law. This jurisdiction would cover the entire operations of each of these companies. Private plaintiffs also would obtain broader rights to sue employers.

For example, under present law, a contractor accused of sex discrimination by one person could face proceedings from:

- EEOC;
- OFCCP;
- Federal court plaintiffs under 42 U.S.C. §1981;
- State FEP agencies;
- State court plaintiffs; and
- Arbitration or other alternate dispute resolution procedures.

Under the proposed legislation, they would face additional discrimination proceedings from:

- Any number of federal funding agencies from which the employer receives direct or indirect government funds;

for violations of:

- Title VI (race discrimination);
- Title IX (sex discrimination);
- Section 504 (handicap discrimination); or
- The Age Discrimination Act of 1975

Unless the proposed legislation is significantly narrowed to (1) define recipients as only those who directly receive federal funds and (2) amended to make only one agency responsible for handling a particular charge of discrimination, federal civil rights enforcement procedures could become unnecessarily duplicative and pose the likely prospect of confused and inconsistent legal standards.

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Vice President and
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Douglas S. McDowell.

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THE CIVIL RIGHTS ACT OF 1984 RESTORES FOUR KEY LAWS TO THEIR FORMER STRENGTH

The Civil Rights Act of 1984 (H.R. 5490 and S. 2568) will resto four key civil rights statutes to their intended scope and effect after a narrowing decision by the Supreme Court — Grove City Colleg v. Bell, 465 U.S. ____, 104 S.Ct. 1211 (1984). The four laws are Title VI of the 1964 Civil Rights Act 1/ Title IX of the Education Amendments of 1972, 2/ Section 504 of the 1973 Rehabilitation Act, 3/ and the Age Discrimination Act of 1975.4/

I. Design of the Laws

Title VI serves as the model for all of the laws at issue.5/ They each follow the same basic structure. The first section contai the prohibition against discrimination. Section 601 of Title VI provides:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The second section contains the enforcement provisions. Section 602 of Title VI states:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program

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1/ 42 U.S.C. SS2000d et seq.

2/ 20 U.S.C. SS1681 et seq.

3/ 29 U.S.C. SS794 et seq.

4/ 42 U.S.C. SS6101 et seq.

5/ See e.g. Cannon v. University of Chicago, 441 U.S. 677 (1979) (Title IX modeled after Title VI); Consolidated Rail Corp. v. Darrone, 465 U.S. ___, 104 S.Ct. 1248 (1984) (Section 504 modeled after Title VI).

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> or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law:
>
> Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."6/

Under this provision, funding agencies are required to issue regulations implementing the law, and in the event of noncompliance with the law may secure enforcement either through termination of federal funding particularized or "pinpointed" to the actual discrimination, "or by any other means authorized by

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6/ The corresponding provisions of Title IX, Section 504 and the Age Discrimination Act as well as Title VI showing the current language as well as the changes in the language made by this bill are contained in Appendix A.

law." The later alternative includes referral to the Department of Justice for suit or a private right of action.7/

II. Past Interpretations of These Laws

A. The Coverage Provisions are Broad

When enacting these laws, Congress stressed their broad and comprehensive coverage. Further, until the current administration, every federal agency charged with responsibility for their enforcement adopted this broad interpretation. From the beginning, the nondiscrimination requirements were applied to all parts of an institution that received federal financial assistance. See, e.g. 45 C.F.R. §293 et seq.; 34 C.F.R. Part 106.

As Senator Humphrey stated, "(t)he purpose of Title VI is to make sure the funds of the United States are not used to support racial discrimination." 110 Cong. Rec. 6544 (1964). References to the broad scope of the statute appear throughout the debates; indeed, both the proponents and the opponents of the legislation agreed upon the breadth of its prohibition of discrimination. See, e.g., id. at 13332, 13378, 13442-43.

Similarly, Title IX was designed as

> "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972) (Remarks of Sen. Bayh).

As Rep. Green stated in response to questions about coverage and whether, for example, an English Department which itself receives no federal funds would be exempt,

> "The purpose of title [IX] is to end discrimination in all institutions of higher education, Yes, across the board. . . . Id. at 39256.

See also 117 Cong. Rec. 30403-04, 30407-08 (1971), (remarks of Senator Cook); id. at 39251-52 (remarks of Rep. Mink); 117 Cong. Rec. 39259 (1971) (remarks of Rep. Green).

Similar broad purposes were articulated for Section 504 and the Age Discrimination Act. With respect to Section 504, see e.g. 117 Cong. Rec. 45975 (Rep. Vanik) (earlier version) ("My

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7/ See e.g. Cannon v. University of Chicago, supra, discussing the private rights of action under Title IX.

proposed legislation will insure equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities."); 118 Cong. Rec. 526 (Senator Percy) (co-sponsor of earlier version) (The bill would "guarantee [] the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse and degradation.")

Courts recognized the broad scope of the laws as well. The list of such cases is long.

Under Title VI, for example, see Lau v. Nichols, 414 U.S. 563 (1964) (Chinese students, who needed special English instruction but were not receiving it, succeeded in establishing a Title VI violation -- the Court merely stated that the San Francisco school district "receives large amounts of federal financial assistance," at 94 S.Ct. 786,788);8/ United States v. El Camino Community Coll. Dist., 454 F. Supp. 825 (C.D. Cal. 1978), aff'd, 600 F.2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (the Department of Health, Education and Welfare may investigate an entire College's compliance with Title VI regardless of the specific funding to the College); Flanagan v. President & Directors of Georgetown Coll., 417 F. Supp. 377 (D.D.C. 1976) (Title VI covers law school's privately funded student financial aid resources because school is housed in structure built with federal financial assistance); Board of Public Instruction of Taylor Co. v. Finch, 414 F.2d 1068 (5th Cir. 1969) (assumes basic Title VI coverage of the entire school district, limitations are placed only on the funds to be terminated under §602); Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974), aff'd, 829 F.2d 514 (4th Cir. 1975) (Veterans Administration educational grants for students are aid to the university as a whole); Serna v. Portales Municipal Schools, 499 F.2d 1147 (10th Cir. 1974) (national origin discrimination under Title VI and the Constitution brought by

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8/ It further stated:

> In 1970 HEW made the guidelines more specific, requiring school districts that were federally funded to "rectify the language deficiencies in order to open" the instruction to students who had "linguistic deficiencies," 35 Fed. Reg. 11595.
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> . . .
>
> Discrimination among students on account of race or national origin that is prohibited includes "discrimination . . . in the availability or use of any academic . . . or other facilities of the grantee or other recipient." (45 C.F.R. §80.5(b)) (94 S.Ct. 786, 789) (emphasis supplied).

Spanish surnamed parents and students involving curriculum content, employment discrimination, and services to rectify language deficiencies -- the Court held that under Title VI, the appellees have a right to bilingual education, yet there was no inquiry into the amount or type of federal funding or how it was used in the district); United States v. Jefferson Co. Board of Education, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385, cert. denied sub nom Caddo Parish Board of Education v. United States, 389 U.S. 840 (1967) (Order for desegregation suit under Title VI covers student participation in all aspects of school life, including extracurricular activities, athletics, etc., without inquiry into which activities were supported with federal aid); Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911 (1967) (suit to force integration of school system for children of Black air force base personnel -- school system received nearly two million in federal aid between 1951 and 1964. "The Bossier Parish School Board accepted federal assistance in November 1964, and thereby brought its school system within the class of programs subject to the Section 601 prohibition against discrimination." (Emphasis supplied.) 370 F.2d at 852); Yakin v. University of Illinois, 508 F. Supp. 848 (N.D. Ill. 1981) (graduate student sued for national origin discrimination when he was terminated from the doctoral program in the psychology department. As long as the University received federal financial assistance, it was unnecessary for the student to prove his department or program received federal assistance).9/

Under Section 504, see e.g. Wolff v. South Colonie School Dist., 534 F. Supp. 758 (N.D.N.Y. 1982) (rights of disabled student to participate in school trip are covered by §504, without proof of federal funding for school trips); Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (D.N.J. 1980) (high school student with only one kidney is entitled to wrestle, without proof of federal funding for high school athletics.); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (undergraduate with sight in only one eye secures right to play football, without proof that the University receives federal funding for athletics); Doe v. Syracuse, 508 F. Supp. 333 (N.D.N.Y. 1981) (no review of the nature of federal funding necessary prior to evaluating employment practices of

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9/ The Court ruled that

> [s]ince the Department and the GEO Program are part of the University, it does not matter whether the University, the Department or the GEO Program receives the federal financial assistance. See Bob Jones University v. Johnson [citation omitted]. Thus, count II cannot be dismissed on the ground that neither the Department, the GEO program nor the plaintiff receive federal financial assistance directly." at 850.

school district which had a discriminatory effect on the application of a teacher); *Garrity v. Gallen*, 522 F. Supp. 171, 212-13 (D.N.H. 1981) (the Court found the entire Laconia State School was covered for §504 purposes); *U.S. v. Baylor Univ. Medical Center*, 564 F. Supp. 1495 (N.D. Tex. 1983), *appeal pending*.

Administrative policies under Title VI which presume institutional coverage at the investigative stages for Title VI were grafted on to §504 in 1978, demonstrating congressional approval of the broad coverage concept. In 1977, Congress conducted oversight hearings on §504. As part of that process, Congress reviewed the 1977 HEW §504 regulations which included the Title VI procedural regulations. Congress explicitly approved these regulations and in the 1978 amendments to §504" . . . codifie[d] [this] existing practice as a specific statutory requirement." S. Rep. 890, 95th Cong., 2nd Sess. (1978). The Title VI procedural regulations provide for investigation and review of recipients of federal funds as that term is defined in the regulations. No mention is made of "programs" until the sections dealing with fund termination. *See* 45 C.F.R. §80.7 and §80.8(c).

Under Title IX, in addition to the Third Circuit decision in the *Grove City College* case, *see e.g. Haffer v. Temple University*, 524 F. Supp. 531 (E.D.Pa. 1981), *aff'd.*, 688 F.2d 74 (3d Cir. 1982) (intercollegiate athletic program which does not receive federal funding earmarked for athletes is nonetheless covered under Title IX). *See also* a series of Department of Education Office for Civil Rights publications such as the HEW Fact Sheet Accompanying Final Title IX Regulation Implementing Education Amendments of 1972 at 3, June 1975, stating:

> "Except for the specific limited exemptions set forth below, the final regulation applies *to all aspects of all education programs or activities of a school district, institution of higher education* or other entity which receives Federal funds for any of these programs." (Emphasis supplied.) From *Grove City College v. Bell*, 104 S.Ct. 1211.

See also Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics. 44 Fed. Reg. 71413, 71414 (Tues. Dec. 11, 1979). In the preamble, HEW stated:

> "III. Scope of Application
>
> . . . This policy interpretation applies to *any public or private institution*, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions

> whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of 'recipient' in Section 86.2 of the Title IX regulation." (Emphasis supplied.)

In short, under these cases and agency interpretations, institutions or other entities receiving federal funds were prohibited from discriminating. The obligation of nondiscrimination was straight-forward and clear-cut.

B. The Enforcement Provisions Are Fine-Tuned

Where federal fund termination was the sanction to be imposed, a narrower approach was adopted. Under Sections 602 and the corresponding provisions in Title IX, Section 504 and the ADA, federal funds may be cut off only to "the particular program or part thereof" that actually has the discriminatory policy.10/

The "two related, but nonetheless different," purposes of "Title IX, like its model Title VI," are set forth in the Supreme Court's opinion in Cannon v. University of Chicago, 441 U.S. at 705:

> "First, Congress wanted to avoid the use of federal resources to support discriminatory practices: second, it wanted to provide individual citizens effective protection against those practices."

To accomplish the second purpose, Congress created the broad-ranging prohibitions found in Sections 601, 901, 504 and 6102. These prohibitions may be enforced without resort to the fund-termination procedures by injunctive actions by parties or

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10/ Fund termination occurs only after the following lengthy administrative process, provided by §602 and the other three analogous provisions:

(1) The agency involved must make a finding that the matter cannot be resolved through voluntary compliance;

(2) An Administrative Law Judge (ALJ) must conduct a hearing and make a determination that a violation has occurred;

(3) An agency reviewing authority hears any appeal of the decision to terminate or, in some instances, the Secretary of the agency is the official who makes the decision on termination. A decision by the agency to terminate funds is not final until after a 30-day notification to congressional oversight committees. Even then, the decision to terminate federal funds may be challenged in court. During the entire process, until no further challenges are made, the recipient continues to receive funding, because courts normally stay the interruption of funds until the final court ruling has been attained.

by the Department of Justice. At the same time, the fund termination remedy was deliberately tailored.

The legislative history demonstrates that Congress understood and intended that these diverse purposes were to be accomplished. In the context of discussing an amendment to §602, stating that no administrative action would be taken on the basis of contracts of loan or guaranty *11/*, a discussion ensued concerning whether there was a need to amend §601 to the same effect, *Id.* at 13435 (remarks of Sen. Long); *id.* at 13436 (remarks of Sen. Long); *id.* at 13438 (remarks of Sen. Dirksen), on the grounds that:

> [S]ection 601 is not limited by section 602... [Although] both sections are in one title...they do not conform...Not only do I say so; the Senator from Minnesota [Sen. Humphrey] says so.

Id. at 13436 (remarks of Sen. Gore).

There was adamant resistance on the part of the sponsors of Title VI, and of the Justice Department, to amending §601 to parallel §602 in this regard *12/*, and §601 was not amended.

Moreover, courts have made clear that the fund-termination enforcement provisions of the three statutes cannot be read as a limitation on their scope. With respect to Title IX, the Supreme Court in *Cannon v. University of Chicago*, *supra*, held that a private right of action exists to enforce *§901* of Title IX, notwithstanding the fund-termination limitations on enforcement in §902. A particular thrust of the Court's analysis was that because of the differences in the reach of §901 and §902, limitations in the latter section could not be read as limitations on the former. *See* 441 U.S. at 703-05.

The same conclusion was reached under Title VI and §504 in *NAACP v. Medical Center, Inc.* 599 F.2d 1247 (3d Cir. 1979). The right established under *§601*, the Court concluded, is "unequivocal, broad and remedial in nature," 599 F.2d at 1251, and was not intended to be limited by the fund-termination provision of §602:

11/ *See* 110 Cong. Rec. 2500-01. These contracts of guarantee were, of course, far different from Guaranteed Student Loans (GSLs) which did not exist when Title VI was passed. In the case of GSL's, a great amount of the federal monies constitute grants in the form of interest subsidies -- not simply loan guarantees.

12/ *Id.* at 13437 (emphasis supplied). *See* *id.* at 13442-43 (remarks of Sen. Pastore); *id.* at 13437 (remarks of Sen. Keating; *id.* at 13442 (remarks of Sen. Humphrey); *id.* at 13469 (remarks of Sen. Long); *id.* at 13448 (remarks of Sen. Dirksen).

> Congress was concerned with limiting the power of federal agencies to bring about compliance with section §601, not with limiting private rights under section 601. That sections 602 and 603 are limits on agencies, and not on rights, is repeatedly made clear in the legislative proceedings.

Id. at 1254.[13] Similarly, in United States v. El Camino Community College District, supra, the court stated

> A pinpoint approach, which requires federal administrative action to be conducted on a program by program basis and which has been applied to limit the power to terminate federal funding is not appropriate in this matter.

454 F. Supp. at 830. Finally, in Flanagan v. President & Directors of Georgetown College, supra, the court discussed the distinction between §601 and §602, and rejected the latter as a restriction on the former:

> [Section 602] of course is directed towards the efforts of federal agencies in effecting compliance with Title VI, and is not a restriction on the types of discrimination outlawed by the statute.

In sum, the distinction between coverage and fund-termination was clearly recognized and articulated throughout the history of these laws.

III. The Grove City Decision Narrowed Both the Coverage and Enforcement Provisions

In Grove City College v. Bell, the Supreme Court addressed the issue of whether Basic Education Opportunity Grants (BEOG's) constituted federal financial assistance to the college for purposes of Title IX coverage. Consistent with the legislative history of Title IX, as well as Title VI, the Court held that BEOG's are aid to the school and therefore bring it within the coverage of Title IX. However, in Part III of its opinion, a majority of the Court also stated that only the financial aid program of the school was required to comply with Title IX and be conducted in a nondiscriminatory manner. The Court not only equated Section 901 with the narrower fund-termination portion of

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[13] Because of §504's parallel construction, the same conclusion was reached under that statute. Id. at 1256.

Section 902, 14/ but failed to give effect either for coverage or fund-termination purposes to the nature of the BEOG funds, which flowed throughout the school and supported all of its activities. In reaching this narrow conclusion, the Court adopted the arguments presented by the government. There was no party in Grove City arguing for a broader reading of the statute, or presenting the legal arguments discussed above to the Court. In fact, the government refused to support a request for argument time for groups to present this broader interpretation.

In essence, the Grove City opinion abandoned the principle of automatic institution-wide coverage. It stated that aid to Grove City College did not necessarily cover all of the school. In particular, it stated that in its view BEOG money was only aid to the financial aid program. According to the Court, although the BEOG funds went to the general fund of the school, and supported all of its activities, all of the school was not covered by Title IX.

This position seriously narrowed fund-termination as well. The seminal case dealing with fund-termination is Board of Public Instruction of Taylor County v. Finch, supra, decided under Title VI in 1969. Under that case, the Court held that:

> "If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper." 414 F.2d at 1078.

This principle that funds be terminated if those funds "support" the discrimination was clearly narrowed in Grove City. There can be no question that BEOG's support the entire college. Under Taylor County BEOG funds would be subject to termination if discrimination occurred anywhere in the college. Yet the Supreme Court in Grove City said that coverage, and therefore fund-termination as well, would only be available if there was discrimination in the financial aid program.

IV. The Legislation Will Restore Broad Coverage While Maintaining Fine-Tuned Enforcement

Given the narrow interpretation of the phrase "program or activity" rendered by the Supreme Court in the Grove City College

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14/ In defining the scope of Section 901, the Court cited legislative history and case law dealing only with Sections 902 and 602. Although expressly not defining "program or activity" in its earlier Title IX case North Haven Board of Education v. Bell, 456 U.S. 512 (1982), the Court there too discussed the fund-termination provision as if it were the same as the coverage section.

case, the legislation deletes the term wherever it is currently used, and substitutes phrases drawn from agency regulations and case law to assure that past interpretations are restored.

The bill makes three sets of changes in the current laws as follows:

1. The general prohibition language in each of the four statutes is modified to delete the reference to "program or activity," which after Grove City has such narrow meaning, and to substitute the term "recipient." The effect of this change is that an entire institution or entity will be prohibited from discriminating when any of its parts receive federal funds. With respect to Title IX, the limitation to education is retained.

2. The same definition of the term "recipient" is added to each of the four statutes. The definition is modeled on the definitions currently in place in the regulations under these laws.

3. The enforcement section of each of the laws is also modified to delete use of the term "program or activity". Under current law, now that "program or activity" is so narrowly defined, fund termination can be unavailable even where discrimination is supported by federal funds. In the case of Grove City College, for instance, no fund termination would be available if there was discrimination against students in the math or science department. The school could continue to receive federal funds regardless of the nature and extent of the discrimination, unless it took place in the student financial aid program. The language change will assure, for example, that when a school discriminates, the federal government has the authority to terminate the federal funds which support the discrimination at the school. Under this approach, the concept of pinpointing remains an integral part of the enforcement section. This section still requires that a nexus between the discrimination and the federal funding be established before fund termination can occur.

Attached as appendix A are copies of the laws with the deleted language crossed out and the language added by the bill underlined.

The definition of recipient in the bill is based upon the definitions used in the regulations. The bill will not change the interpretation of prior administrations as to whether or not an entity is considered a recipient, must sign an assurance form and be bound to comply with these laws. It will not change the first part of the Grove City College opinion which held that the College is a recipient of federal funds.

Hence, as has always been the case, if a university which is part of a State system of higher education receives a grant, that university, not the entire State system, is the recipient

Similarly, fund termination will work as it has in the past. It is limited to the entity or part thereof as to which discrimination was found, and the termination must also be "limited in its effect to the particular assistance which supports such noncompliance so found...." (emphasis added). As discussed above, the principle of the limitation on fund-termination to those monies supporting the discrimination comes directly from Board of Public Instruction of Taylor County v. Finch, supra. Hence, fund-termination will work no differently than it has in the past. The same protections still apply. The same standards are in place.

Just as Mr. Pastore stated when Title VI was debated in the Senate in 1964,

> In other words, if there were 100 school districts and discrimination was found in one school district, the funds would be cut off for only the one school district, but not the funds for the other 99.

110 Cong. Rec. 7059 (1964). So too if the vocational education funds today are distributed by the state education agency to 350 school districts and two are found to discriminate with those funds, then such funds can be terminated at those two districts, but not the other 348. The state agency's federal vocational education funding would only be terminated if it were also found that discrimination was practiced by the state agency.

Just as the Senators in 1964 stressed that a state's federal road building funds would not be terminated when discrimination occurred in the federally assisted aid to dependent children program (110 Cong. Rec. 7059), so too this legislation maintains the limitations on fund termination based on differing government functions. Thus, if there are federal grants supporting the police and health departments of City A, and race discrimination is found in the police department, the federal funding supporting the discrimination is that for the police department, not the health department. Only police department funds of City A would be terminated, not those in the health department.

V. Any Claims That This Legislation Expands Upon Previous Administration Interpretations Are Unfounded

It is beyond dispute that the Grove City College decision represents a dramatic change in the way these laws have been interpreted and enforced in the past. In advancing the position ultimately adopted by the Supreme Court, the government conceded that its position represented a change from previous administrations. And since the decision was rendered, the Department of Education has started to close and narrow cases it had previously considered covered by Title IX on the grounds that since Grove City College the agency no longer has jurisdiction over the discrimination at issue. Attached as Appendix B are several examples of such actions.

Critics of this bill have advanced what in essence are two separate arguments, although they are usually joined. The first is that the Grove City decision was a good one on general policy grounds, or even that it went too far in considering student aid as aid to the school at all. Under this approach, any legislation such as the Civil Rights Act of 1984 goes too far since it broadens civil rights coverage beyond that provided by the Grove City College decision.

Some claim there will be a major intrusion by the government into the lives of private citizens and that many of our systems will be turned upside-down. These scare tactics are not new. When Title VI was introduced in 1964, opponents made similar claims. For example, it was stated "Virtually every nook and cranny of the private lives of individual Americans would be touched and tainted by the obnoxious proposal." 110 Cong. Rec. 1619 (1964) (Rep. Abernathy). Suffice it to say that the need for strong civil rights legislation has been well-documented. That evidence, and the policies supporting this legislation will not be repeated here.

The second argument critics raise is that this bill goes beyond the interpretations and enforcement of these laws by past administrations. This argument, too, is simply without merit.

Discussed above is the ample legislative history, case law and agency regulations which support the precise coverage and enforcement scheme put in place by this bill. The very language of the bill is drawn from agency regulations and case law. Moreover, a review of some of the specific allegations shows how unfounded they are.

1. Social Security Payments Do Not Trigger Coverage of Schools Whose Students Receive Such Public Benefits

It has been claimed that schools whose students receive Social Security payments or food stamps will now be covered. That is simply untrue. The Supreme Court itself explained the difference between student aid and Social Security or food stamps.

> "Grove City's students receive BEOGs to pay for the education they receive at the College. Their eligibility for assistance is conditioned upon continued enrollment at Grove City and on satisfactory progress in their studies. 20 U.S.C. §§1091(a)(1), (3). Their grants are based on the "cost of attendance" at Grove City, 20 U.S.C. §1070a(a)(2)(B)(i), which includes the College's tuition and fees, room and board, and a limited amount for books, supplies, and miscellaneous expenses. 34 CFR §690.51 (1982). The amount that students and their families can reasonably be expected to contribute is subtracted from the maximum BEOG to ensure that the assistance is used solely for

> educational purposes, 20 U.S.C. §1070(a)(2)(A)(i), and students are required to file affidavits stating that their awards will be "used solely for expenses related to attendance" at Grove City. 20 U.S.C. §1091(a)(5); see 34 CFR §§690.79, 690.94(a)(2)(1982).
>
> Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately receive federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individuals' eligibility for general assistance is not tied to attendance at an educational institution." (Emphasis supplied)

This section of the opinion remains in tact. The legislation in no way changes the reasoning of the court in finding student aid as aid to the school, and its review of the term "recipient." The definition of the term "recipient" in the bill is drawn from the same definition of "recipient" in the regulations interpreted by the Supreme Court to exclude the schools whose students receive food stamps, welfare benefits and Social Security payments. Under the bill, as has always been true, neither the landlord whose rent is paid with the proceeds of an AFDC or SSI check, nor the grocer who is paid for food from an SSI check, is covered.

2. State and Local Governments Are Not Covered by Grants to a State University System

It has been claimed that under the new bill federal assistance to a State University system covers all state departments and agencies. In fact, when funds are going directly to the state university system, the recipient of the assistance is only the university system. Therefore, as has always been the case, only the university system is the recipient, not all of the state government.

3. Coverage of Educational Institutions and Activities Remain Unchanged

Unlike the other three statutes, since its enactment in 1972 Title IX's coverage has always been limited to education. Title IX does not cover road construction, public housing, public assistance, and all the federally assisted activities other than education that are covered by Title VI, §504 and the Age Discrimination Act. It has been claimed that the bill would extend the reach of Title IX to educational benefits in non-educational institutions when those educational benefits are not supported by federal assistance going to the institution itself. It has also been claimed that the bill would extend the reach of Title IX to "non-educational" activities of universities. In fact, the government's past position on this issue is clear. For example, the Department of Agriculture's Title IX regulations expressly provide:

> "Education program or activity" means:
> (1) every program or activity operated by an educational recipient; and
>
> (2) every program or activity operated by other recipients where a significant purpose of the financial assistance is education.

7 C.F.R. §15a.2(q).

Some express surprise that Title IX covers the education components of prisons. Yet the Justice Department itself intervened on the plaintiffs' side in a case brought by female inmates of one Kentucky state prison which was found to discriminate on the basis of sex in its vocational education offerings. The state prison system was federally assisted and the government's brief argued that such receipt made the prison a recipient under Title IX. See Canterino v. Wilson, 564 F. Supp. 174, (W.D. Ky. 1982), modified sub nom Canterino v. Barber, 564 F. Supp. 711 (1983). See also Glover v. Johnson, 478 F. Supp. 1075 (E.D. Mich. 1979). Sex discriminatory practices in federally assisted prison vocational education programs violated Title IX before Grove City was decided, and, therefore will also after this bill is enacted.

Critics have also claimed that the changes in language will result in coverage of such semi-autonomous entities as the Hoover Institute at Stanford University, which heretofore have been beyond the reach of the civil rights statutes. Such opponents must be unaware of the significant assistance provisions of the Title IX regulations, for example, which requires that recipients refrain from providing "significant assistance" to organizations which discriminate. 34 C.F.R. §106. Thus the Hoover Institute, if it were not itself a recipient, would have been covered if Stanford University, which is without question a recipient, were providing significant assistance to the Institute. See e.g. Iron Arrow Honor Society v. Schweiker, 702 F.2d 549 (Former 5th Cir. 1983), vacated as moot, 52 U.S.L.W. 3385 (November 15, 1983).

4. The Availability of Private Suits Is Not Changed

Some opponents sound the alarm that these amendments will permit any member of the Bar to serve as an attorney general and bring private suits to enforce these laws. However, the Age Discrimination Act provides for private actions in the language of the statute. See 42 U.S.C. §6104(e). The existence of an implied private right of action has been expressly confirmed by the Supreme Court decisions for all three other statutes beginning with Title IX, Cannon v. University of Chicago, 441 U.S. 677 (1979), progressing to Title VI in Guardians v. Civil Service Commission, 103 U.S. 3221 (1983), and finally §504 in Consolidated Rail Corp. v. Darrone, 465 U.S. ___, 104 S.Ct. 1248 (1984). No change in these interpretations is made by the Civil Rights Act of 1984.

5. Federal Agency Overlap is Not Increased

Some assert that the new legislation will broaden the overlap between federal enforcement agencies, thereby increasing confusion for recipients who may be subjected to inconsistent requirements regarding nondiscrimination in employment.15/ Nothing in the amendments expands coverage with respect to employment. The Supreme Court ruled definitively regarding Title IX (North Haven Board of Education v. Bell, 456 U.S. 512 (1982)) and §504 (Consolidated Rail Corp. v. Darrone, 465 U.S. ___, 104 S.Ct. 1248 (1984)) that these statutes cover employees without restriction. Title VI provides limited coverage of the employment relationships covering employees when employment is a primary purpose of the federal funds or, in schools, when the students are affected by discrimination in employment. See e.g. Caulfield v. Board of Education of City of New York, 583 F.2d 605 (2d Cir. 1978) and 632 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Two Executive Orders and a set of joint regulations are designed to promote regularized cooperation between agencies with overlapping duties and prevent the negative effects from the overlap. Executive Order 12250 assigns coordination authority under Title VI, IX, and §504 to the Justice Department. This order was intended to enhance intergovernmental coordination so that conflicting interpretations and inconsistent regulatory provisions would not interfere with the enforcement of these civil rights laws. Justice is also authorized to encourage delegation agreements and lead agency designations for enforcement purposes. Executive Order 12067 assigns coordination authority for employment discrimination policies to the Equal Employment Opportunities Commission (EEOC), which in turn, jointly with the Justice Department, has promulgated regulations on how employment discrimination claims under Title VI and IX, which are filed with funding agencies but would also constitute Title VII or Equal Pay Act claims, will be treated. 48 Fed. Reg. 3570 (1983). The courts have consistently understood that Congress has made clear that overlapping jurisdiction for employment discrimination claims are acceptable. See e.g. Alexander v. Gardner-Denver, 415 U.S. 36, 47-49 (1974). Johnson v. Railway Express Agency, Inc.,

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15/ The Age Discrimination Act explicitly excludes coverage of employees. 42 U.S.C. §6103 (c)(1)

421 U.S. 454, 459 (1975); International Union of Electrical Radio & Machine Workers v. Robbins & Myers, 429 U.S. 229 (1976). Thus there is nothing either new or unusual about employment coverage provided by these laws, nor will overlap with other statutes make enforcement unmanagable.

. . .

6. Many Examples Presented of How the New Bill Will Work are Incorrect

Many of the hypothetical examples suggested by critics to illustrate the effects of this legislation incorrectly describe how the new law will work and erroneously maintain that there are differences in results between the old law and the new amendments. For example, one writer posits that a block grant from HHS goes to a state department of health, which designates the mental health center of County A to receive funds. County A's mental health center becomes the subrecipient under these amendments, just as was true before Grove City. However, the discrimination occurs in County B's, not County A's, mental health center, and County B receives no federal funds. The writer was wrong in concluding that County B's health center is covered. This is because the county health departments are separate governmental units that are not contained within the state health department. When the state health department receives federal funds, the entire state health department, and all of its subunits are covered. In this hypothetical situation, since County B's mental health center is not part of the health department, it is not a recipient and is not covered. The same result would have occurred before the Grove City case was decided as well. No funding could be terminated; no referral to Justice could be made and no private lawsuit under these four statutes could be brought.16/

Another example supposes that the National Endowment for the Arts awards funds to an art museum for a special exhibit on cubism. The author is incorrect in assuming the museum was only covered as to its Special Exhibits Department with regard to the

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16/ If instead the state had divided the same funding between mental health centers in County A and County B, and discrimination was alleged to exist in the County B mental health center, then only County B's mental health funding and not County A's funding would be endangered by a discrimination finding as to County B. Fund termination, of course, is not the only remedy possible. HHS could refer the case to Justice for a court suit to ensure that the discriminatory acts were ended, rather than terminate funds, or suits brought by a private person or a group may be used to address the violation. No changes in coverage or the application of the fund termination remedy would result from these amendments.

coverage of §504 before Grove City. The whole museum is covered once it receives a federal grant. That was the interpretation prior to Grove City as well as with the provisions included in the Civil Rights Act of 1984. See e.g. Piascik v. Cleveland Museum of Art, 426 F. Supp. 779 (N.D. Ohio 1976). The recipient here is not the special exhibits department of the museum, but rather the whole museum. It is therefore unnecessary in this instance to apply the language in the definition of recipient, "or which receives support from the extension of Federal financial assistance to any of its subunits." 17/

In short, many stated objections to the bill reflect either a profound antipathy to the purposes of the civil rights laws themselves and a desire that they be limited as much as possible, or a profound misunderstanding of the way in which these laws have worked in the past and the way in which the bill would affect their operation in the future.

These laws have been a positive force in achieving fairness in this country. They reflect a moral commitment that individuals will not be held back because of discrimination. We can ill-afford to turn our back on our commitment to fairness and equity regardless of race, national origin, sex, disability or age.

17/ In fact, this language operates in a very simple manner. It would be applied, for example, in the case of a grant to the police department of a city, which includes funds for the city itself to cover central administrative costs.

EXHIBIT A

TITLE VI PORTION OF S.2563 AND H.R.5490

I. Section 601 of Title VI, 42 U.S.C. §2000d, is amended to read:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation ~~in~~, be denied ~~the~~ benefits ~~of~~, or be subjected to discrimination ~~under any program or activity receiving~~ by any recipient of Federal financial assistance."

II. The following definition of recipient is added to Title VI as the new §606:

(606) For the purpose of this title, the term "recipient" means --

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

III. Section 602 of Title VI is amended to read:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any ~~program or activity~~ recipient, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such ~~program or activity~~ recipient by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance ~~under such program or activity~~ to any recipient as to ~~whom~~ which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to ~~whom~~ which such a finding has been made, and shall be limited in its effect to the particular ~~program, or part thereof, in which~~ assistance which supports such noncompliance ~~has been~~ so found, or (2) by any other means authorized by law:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

TITLE IX PORTION OF
PROPOSED CIVIL RIGHTS LEGISLATION

I. Section 901 of Title IX is amended to read:

"No person in the United States shall, on the basis of sex, be excluded from participation ~~in~~, be denied ~~the~~ benefits ~~of~~, or be subjected to discrimination ~~under any education program or activity receiving~~ by any education recipient of Federal financial assistance, except that:" [the exceptions that follow are retained without change].

II. The following definition of "recipient" is added to Title IX as §901(c)(2):

(2) For the purpose of this Title, the term "recipient" means --

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

III. Section 902 of Title IX, is amended to read:

"Each Federal department and agency which is empowered to extend Federal financial assistance ~~to any~~ for education ~~program or activity,~~ by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to ~~such program or activity~~ recipients by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance ~~under such program or activity~~ to any recipient as to ~~whom~~ which there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to ~~whom~~ which such a finding has been made, and shall be limited in its effect to the particular ~~program, or part thereof, in which~~ assistance which supports such noncompliance ~~has been~~ so found, or (2) by any other means authorized by law:

Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

§504 PORTION OF S.2568 AND H.R.5490

I. Section 504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. §794, is amended to become §794a and to read:

"No otherwise qualified handicapped individual in the United States, as defined in §706(7) of this title, shall, solely by reason of ~~his~~ such individual's handicap, be excluded from participation ~~in~~, be denied ~~the~~ benefits ~~of~~, or be subjected to discrimination ~~under any program or activity receiving~~ by any recipient of Federal financial assistance or ~~under any program or activity conducted~~ by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee."

II. The following definition of "recipient" is added to §504 as §794(b):

(b) For the purpose of this section the term "recipient" means --

"(1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

III. Section 505(a)(2) is amended to read:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 as amended shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act."

AGE DISCRIMINATION ACT PORTION OF S.2568 AND H.R.5490

I. Section 302 of the Age Discrimination Act of 1975 (42 U.S.C. §6101 *et seq.*) is amended to read:

"It is the purpose of this chapter to prohibit discrimination on the basis of age ~~in programs or activities receiving~~ by recipients of Federal financial assistance, including ~~programs or activities receiving funds under the State and local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)~~ recipients of funds under Chapter 67 of title 31, United States Code."

Section 303 of the Age Discrimination Act, 42 U.S.C. §6102, is amended to read:

"Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation ~~in~~, be denied ~~the~~ benefits ~~of~~, or be subjected to discrimination ~~under any program or activity receiving~~ by any recipient of Federal financial assistance."

II. Along with several punctuation changes in other clauses of §309, the following definition of recipient is added to the Age Discrimination Act as §309(4):

(4) The term "recipient" means --

"(A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and

"(B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit,

to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits.".

III. Section 305 of the Age Discrimination Act, 42 U.S.C. §6104, is amended to read:

§6104(a): "The head of any Federal department or agency which prescribes regulations under section 6103 of this title may seek to achieve compliance with any such regulation -- (1) by terminating, or refusing to grant or to continue, assistance ~~under the program or activity involved~~ to any recipient with respect to whom there has been an express finding on the record, after reasonable notice and opportunity for hearing, of a failure to comply with any such regulation; or (2) by any other means authorized by law."

§6104(b): "Any termination of, or refusal to grant or to continue, assistance under subsection (a)(1) of this section shall be limited to the particular political entity or other recipient with respect to which a finding has been made under subsection (a)(1) of this section. Any such termination or refusal shall be limited in its effect to ~~the particular program or activity, or part of such program or activity, with respect to which such finding has been made~~ assistance which supports the noncompliance so found. No such termination or refusal shall be based in whole or in part on any finding with respect to any noncompliance which is not supported by such assistance ~~any program or activity which does not receive Federal financial assistance.~~ Whenever the head of any Federal department or agency who prescribes regulations under section 6103 of this title withholds funds pursuant to subsection (a) of this section, he may, in accordance with regulations he shall prescribe, disburse the funds so withheld directly to any public or nonprofit organization or agency, or State or political subdivision thereof, which demonstrates the ability to achieve the goals of the Federal statute authorizing the program or activity while complying with regulations issued under section 6103 of this title."

IV. Section 304(a)(4) of the Age Discrimination Act, 42 U.S.C. §6103(a)(4), is amended to read:

Not later than ninety days after the Secretary publishes final general regulations under paragraph (a)(3), the head of each Federal department or agency which extends Federal financial assistance ~~to any program or activity~~ by way of grant, entitlement, loan, or contract other than a contract of insurance or guaranty, shall transmit to the Secretary and publish in the Federal Register proposed regulations to carry out the provisions of section 6102 of this title and to provide appropriate investigative, conciliation, and enforcement procedures. Such regulations shall be consistent with the final general regulations issues by the Secretary and shall not become effective until approved by the Secretary."

V. Section 304(b)(1) of the Age Discrimination Act, 42 U.S.C. §6103(b)(1), is amended to read:

"It shall not be a violation of any provision of this chapter, or of any regulation issued under this chapter, for any person to take any action otherwise prohibited by the provisions of section 6102 of this title if, ~~in the program or activity involved~~ --

> (A) any action reasonably takes into account age as a factor necessary to the normal ~~operation~~ operations of the recipient or the achievement of any statutory objective ~~of such program or activity~~ in furtherance of which the Federal financial assistance is used; or"

VI. Section 304(c)(1) of the Age Discrimination Act, 42 U.S.C. §6103(c)(1), is amended to read:

"Except with respect to ~~any program or activity receiving~~ Federal financial assistance for public service employment under the Comprehensive Employment and Training Act of 1974 (29 U.S.C. 801 et seq.), as amended, nothing in this chapter shall be construed to authorize action under this chapter by any Federal department or agency with respect to any employment practice of any employer, employment agency, or labor organization, or with respect to any labor-management joint apprenticeship training program."

VII. Section 305(e)(1) of the Age Discrimination Act, 42 U.S.C. §6104(e)(1), is amended to read:

"(1) When any interested person brings an action in any United States district court for the district in which the defendant is found or transacts business to enjoin a violation of this title ~~Act by any program or activity receiving Federal financial assistance~~, such interested person shall give notice by registered mail not less than 30 days prior to the commencement of that action to the Secretary of Health and Human Services, the Attorney General of the United States, and the person against whom the action is directed. Such interested person may elect, by a demand for such relief in his complaint, to recover reasonable attorney's fees, in which case the court shall award the costs of suit, including a reasonable attorney's fee, to the prevailing plaintiff."

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

May 4, 1984

MEMORANDUM FOR: Dave Stockman
Joe Wright
M. B. Oglesby
Chris DeMuth

FROM: Mike Horowitz MH

SUBJECT: S. 2568: The "Civil Rights Act of 1984"

Bob Dole has emphasized that "[i]t is not the intent of the sponsors [of S. 2568] to break new ground". While this may not be the intent of Senator Dole (and of Howard Baker, among other cosponsors), the bill's impact if enacted is more accurately suggested by the sweep of its title: the "Civil Rights Act of 1984". Although the statutory changes S. 2568 would effect appear on their face to be limited and technical, they would in fact substantially expand the reach of Title VI, Title IX, Section 504, and the Age Discrimination Act (the "referenced acts") beyond that previously asserted by Federal agencies. Buttressed by the legislative history created to date, the bill if passed would largely eliminate the remaining distinctions between Federal and state, and Federal and private, concerns.

Under the current terms of S. 2568, for example, every licensed attorney would be empowered to file suit to enforce the "effects test" regulations of agencies, challenging practices in *every* aspect of *every* institution that receives *any* Federal assistance "directly ... or through a person"; including State bar examinations and teacher competency tests, and perhaps even the employment practices of grocers handling food stamps. Moreover, each agency would be required to police *all* activities of its grant recipients (including recipient activities outside of the scope of its expertise), and agency officials could even be subject to personal liability suits for failing to apply the "effects standard" to that unlimited range of activities. As S. 2568 has received no detailed attention to date, these and other major implications of the legislation have not been considered, or even suggested. They are detailed in the discussion below:

1. *Coverage*. The anti-discrimination statutes affected by S. 2568 currently cover "any *program or activity* receiving Federal financial assistance". S. 2568 would amend these statutes to instead cover "any *recipient* of Federal financial assistance" (in Title IX, the term "education recipient" is substituted for the term "recipient"). The following are only some examples how this

change in coverage would operate for these statutes that have as their purpose the ordering of changes in the practices of Federal fund recipients, who are put at risk of losing those Federal funds:

a. State and local governments. Currently, if a Federal agency extends Federal assistance, e.g. to a State university system, its broadest claim would be that the entire university system is covered by these statutes. Under S. 2568, however, all State departments and agencies would be covered by any requirements which Federal agencies might impose under the referenced acts (dealing with age, sex, race, color, national origin, and handicap). S. 2568 thus raises serious problems of Federalism by extending Federal mandates to State and local activities and agencies which receive no Federal funds whatever. The Act would also (for reasons explored more fully below) substantially increase the financial and paperwork burdens of compliance.

b. "Education activities" of non-educational institutions. Title IX currently covers any "education program or activity receiving Federal assistance". S. 2568 would dramatically extend the reach of Title IX to educational benefits not supported by Federal assistance offered by non-educational institutions, if those institutions receive Federal assistance for any purpose. According to Senator Kennedy's floor statement, if a state prison, e.g., were to receive "federal funding to develop a better inmate classification system, and no other federal assistance, [its] education activities and related benefits, such as classes and training programs, [would be] covered by Title IX". In addition to "juvenile and adult prisons", Kennedy also specifically mentioned "museums" and "hospitals not affiliated with a university". Thus, for example, internship programs of non-university affiliated hospitals would be covered if they receive any Federal assistance.

c. Non-education activities of universities. Finally, S. 2568 would extend the jurisdictional reach of enforcers of the referenced anti-discrimination acts, for the first time, to all activities and components of universities regardless of whether they receive Federal assistance. Universities that own real estate would, for example, be required to assure that all of their holdings comply with Federal architectural requirements on pain of expensive litigation and, indeed, for loss of any Federal funds construed as "supporting the noncompliance". The employment practices of university presses and other businesses (e.g., Howard University's for-profit radio station) would be covered under Section 504 and, in some instances, Title IX and Title VI. DOEd's Office of Civil Rights might, for the first time, be able to assert coverage of semi-autonomous institutions such as the Hoover Institute at Stanford.

2. *Erosion of existing limitations on fund terminations.* By explicitly amending and broadening current language "pinpointing" the effect of fund terminations -- one of the key (although not the only) enforcement modes of the referenced acts -- S. 2568 also significantly enlarges the range of assistance which agencies may terminate. The bill would remove the current requirement that any termination of Federal financial assistance must be "limited in its effect to the *particular program, or part thereof*" in which noncompliance has been found, replacing it with a fund cut-off reaching any "*assistance which supports* the noncompliance so found". Although sponsors of the bill deny that this change enlarges the potential scope of fund termination, these denials are contradicted by the imprecision and potential breadth of the term "supports" -- and by their own statements. Senator Kennedy, for example, emphasizes that "nexus" between the assistance and any discrimination found could be "direct or *indirect*" (*Congressional Record*, April 2, 1984, p. 4587); and Senator Cranston has emphasized that the amendment would assure that the assistance at risk in any dispute between a recipient and an agency civil rights office would *not* be "pinpointed":

> "This modification of the so-called 'pinpointing' language [is designed] to insure that the threat of fund termination remains a credible administrative tool and is *not susceptible to so narrow an interpretation as to lose its force*" (Ibid., p. 4595).

3. *Consequences of removing current constraints*. Withall, the most important aspect of the bill may relate to the effect of its changes on existing powers and processes under the referenced anti-discrimination acts. Currently, limitation of coverage to programs and activities receiving Federal assistance serves as a "regulatory breakpoint", restricting burdens and liability to those programs and activities in which the Federal government has some financial interest; and by limiting review and investigatory authority over Federally assisted programs and activities to agencies with expertise in them. And the current "pinpoint provision", by providing definite limits to the scope of any penalties which agencies might impose, has had a similar moderating effect. S. 2568 would remove these "breakpoints", while at the same time retaining all current judicial interpretations and agency practices under the referenced acts. As a result, standards such as the "effects test" would become applicable to *all* of a recipient's programs and activities, not just those receiving Federal funds. In the case of State recipients, for example, new bases would be provided for challenging the "adverse impacts" of standards established for teachers, attorneys, and other professionals. Changes of this magnitude have not been debated, much less understood, in the discussions that have thus far taken place with regard to S. 2568, and should not be permitted to take effect by default:

a. *Extended coverage of agency regulations prohibiting neutral procedures that have "disproportionate impacts".* In *Guardians Association, Inc. v. Civil Service Commission of New York*, the Supreme Court held (in 1983) that although Title VI itself prohibits only *intentional* discrimination, agency regulations implementing Title VI may nevertheless prohibit practices having a "disproportionate impact", regardless of their intent. DOEd's regulations in this regard are typical, stating that recipients may not:

> "...directly or through contractural or other arrangements, *utilize criteria or methods of administration which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the *effect of defeating or substantially impairing accomplishment of the objectives of the program as respect[s] individuals of a particular race, color, or national origin*".

Elsewhere, DOEd's regulations provide that:

> "*even though past discriminatory practices attributable to a recipient ... have been abandoned*, the consequences of such practices [may] continue to impede the full availability of a benefit. If the efforts ... to provide information as to the availability of the program or activity, and the rights of beneficiaries ... have failed to overcome these consequences, it will become necessary [for such] recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subjected to discrimination. This action might take the form, for example, of *special arrangements for* ... *making selections* which will *insure that groups* previously subjected to discrimination are adequately served".

Currently, the scope of such mandates is limited to a recipient's federally funded programs and activities. The effect of extending them to all of a recipient's activities would be significant. Any assistance to a State or city government would, for example, apply such requirements to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have "discriminatory effects" would now be covered *by the existing regulations* for the first time and would be subject to agency enforcement activities and private lawsuits. Practices other than tests would be affected. For example, New York City's Taxicab "Medallion System" (Walter Williams, among others, has argued) has a demonstrable "adverse impact" on minorities.

b. Existing compliance burdens would be compounded. Agency regulations and paperwork requirements imposed under the statutes referenced by S. 2568 are currently onerous in many respects -- as witness the frequent references by university administrators and State and local officials to "mandate millstones", paperwork burdens, and duplicative enforement activities by Federal agencies. S. 2568, which would give all funding agencies authority -- indeed, the statutory responsibility -- to regulate all of the programs, activities, and subunits of entities to which they provide any assistance, will remove all existing boundaries of agency jurisdiction to conduct compliance reviews and complaint investigations. The result, particularly for universities and State and local governments which typically receive funding from many agencies and hence would be required to contend with multiple compliance reviews and reporting requirements, could be dramatic. Complainants could file with several agencies -- or single out the civil rights offices most likely to be sympathetic to their claims. Moreover, the "program and activity" language of current law would no longer contain the force and effect of agency excesses. For example:

- DOEd has attempted to require New York City to reassign its teachers, in violation of applicable union contracts, to achieve "racial balance" in the teaching staff of each school. Under S. 2568, DOEd would have the authority to apply similar requirements (and the rationale upon which they were based) to, e.g., New York City's police department, fire department, and municipal hospitals as well.

- State and local civil service commissions now largely subject only to OPM's oversight, if at all, under the above-referenced acts would become subject to the full range of "effects test" requirements currently set forth in the regulations of every Federal agency which provides any funds to the State or local government.

Agency expertise in the operation of programs and activities they fund would no longer promote the avoidance of obviously inappropriate requirements; as noted, all agencies giving funds, e.g., to a State, would be responsible for all activities of its federally funded and unfunded components. Agency compliance officers would almost certainly be embroiled in "turf battles" concerning, e.g., who would conduct particular investigations and enforcement proceedings, and this could dramatically increase paperwork requirements and FTE levels.

c. Coverage of institutions which receive no direct Federal funds. The extension of coverage to all programs and activities of institutions receiving any "Federal financial assistance", it cannot be overemphasized, would be based on the Supreme Court's Grove City definition of Pell grants to students as "Federal financial assistance" to the institutions they attend. Other Federal benefit programs, such as food stamps, work in a similar manner -- making, e.g., supermarkets that redeem food stamps potential "recipients of Federal financial assistance" (S. 2568's definition of "recipient" specifically includes entities "to which Federal financial assistance is extended (directly or through ... a person)"). Federal architectural requirements alone would constitute a costly burden on large chains and small grocers alike -- not to mention application of agency "effects test" regulations to their employment and other activities. (See Department of Agriculture regulations at 7 CFR 15b.4(a)(4).) Moreover, since S. 2568 would define as a "recipient" any "transferee of any [entity] to which Federal financial assistance is extended (directly or through another entity or a person)", the definition of "recipient" might be limited only by the imagination of agency enforcers, given those vague terms in the bill.

d. The exposure of recipients to private suits. This is a further consequence that requires empahsis and full public discussion. Federal law provides for the award (at the discretion of Federal courts) of "reasonable attorneys' fees" to prevailing plaintiffs in any private suit to enforce Title VI, Title IX, Section 504, and the Age Discrimination Act. This substantial incentive to file such suits is currently limited by the restriction of these statutes to programs and activities receiving Federal assistance. S. 2568 would thus open all of a recipients' activities to private suits over practices deemed to have "discriminatory effects", regardless of their intent. The substantial impact of this increased exposure regarding "services and benefits" -- enforceable by all private members of the bar, effectively designated as "private Attorneys General" under current law -- is readily apparent.

e. Liability of agency officials. Finally, the changes that S. 2568 would effect must be fully examined in light of the Supreme Court's recent action letting stand the Circuit Court opinion in National Black Police Association v. Velde, which significantly extended the potential personal liability of officials for payment of money damages. As the Washington Post commented editorially on May 2: "Under the court of appeals approach, officials throughout the government who act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability" (a copy of this editorial is attached). Effecting

S. 2568's substantial extension of coverage and dilution of existing "pinpoint" restrictions on fund termination in conjunction with this significant increase in the vulnerability of agency enforcement officials to in terrorem demands by advocacy groups would have important implications for both the Federal Government and all Federal grantees which needs to fully defined and debated before being allowed to take effect.

4. The absence a national prohibition against employment discrimination on the basis of handicap may be a coverage deficiency which should be corrected. Our broadest prohibition, Title VII, does not cover discrimination based on disability -- and not necessarily for the best of reasons. But undoubtedly the most significant reason Congress has not simply extended Title VII to cover discrimination based on disability is that such a simplistic approach would benefit neither persons with disabilities nor employers (while race must never disqualify a person for any job, no one would argue that this is the case with regard to all disabilities and all jobs). The task is by no means undoable, however, and carefully considered legislation prohibiting employment discrimination based on disability would be clearly appropriate. S. 2568, however, would have the effect of turning this Congressional responsibility over to Federal agencies and the courts. In Consolidated Rail Corp v. Darrone (decided the same day as Grove City), the Supreme Court held that Section 504 prohibits employment discrimination based on disability in all Federally assisted programs and activities, and a private right of action exists to enforce those rights. By eliminating the "program and activity" limitation, however, S. 2568 prohibits employment discrimination based on disability (in all operations of all recipients of Federal assistance) -- but with no legislative history to guide agencies and the courts in interpreting the prohibition. And the agencies involved would be agencies inexpert in employment discrimination -- not the EEOC, the agency specifically established by Congress to administer the national prohibitions against employment discrimination. And whereas Title VII, for example, is enforced in a manner that largely complements state and local prohibitions against covered discrimination (Title VII complaints are even referred to State and local agencies with equivalent jurisdiction for investigation), the same would not be true of the prohibition S. 2568 would -- by default -- create. State and local government employment would predictably bear the brunt of the uncertainty over what is, and is not, employment discrimination based on handicap (e.g., the extent to which failure to expend resources on additional personnel -- such as "readers" for the blind employees -- or special equipment required to accommodate disabilities constitutes employment discrimination on the basis of handicap). Existing state laws would be effectively superseded as these matters are decided by Federal agencies and the courts.

5. If passed in its current form, S. 2568 would clearly effect major changes in the relationships between the Federal government, State and local governments, and private institutions. The extensive coverage it would give to these statutes, without modification of the broad sweep they have been given by agencies and the courts, would as noted largely eliminate the remaining distinction between public and private (and Federal and local) activities.

6. The simplest way to avoid this result would be to tailor the legislative remedy to the perceived problem created by the Grove City decision, which is the application of nondiscrimination requirements to educational institutions. This can be accomplished by amending Title IX to prohibit discrimination based on race, color, national origin, age, or handicap; and to specify that any assistance to an educational institution will result in coverage of all of its education programs -- and would, of course, be a true "repeal" of the Grove City decision. This is an outcome the Administration might support, and could surely live with -- particularly if the jurisdictional reach of the Act went to educational activities of educational institutions not, as S. 2568 does, to all of their non-educational investment and income producing functions as well. Such an outcome would of course be consistent with the announced "no new ground" character of S. 2568.

7. If, however, the legislation cannot be limited "merely to education", I believe it essential for Congress and the Administration, for the reasons cited above, to actively consider amendments that would secure the following basic principles:

- Coverage to be based on direct Federal assistance to an institutions (the legislation could make clear that it is not intended to eliminate Pell grants as a basis for coverage).
- For coverage purposes, State and local "recipients" to be defined as the specific public agencies receiving the assistance -- not the entire state or local government.
- Wildly overlapping agency jurisdiction to be precluded by centralizing enforcement activities in a single agency -- most logically the Department of Justice.
- The existing "pinpoint provisions" for fund termination in the statutes to be retained. If there is no intent to change the present scope of fund termination, there is no need to change the existing language.

- Carefully calibrating prohibitions against employment discrimination based on disability. What the political system has been unwilling to accomplish through direction and attentiveness should not be imposed on a large group of employers through legislative indirection and unguided agency regulations and court actions.
- Clearly establishing and defining the personal immunity of officials implementing the referenced anti-discrimination acts.
- Assuring that infants with disabilities are not subject to discrimination in the provision of medical care and related benefits has been a major enforcement objective of the President -- and consideration should be given to the idea that any broad extension of coverage such as that proposed by S. 2568 should include language expressly prohibiting such discrimination.

8. As Nathan Glazer observed in his book, Affirmative Discrimination, the most far reaching changes in the enforcement of our civil rights laws were generated during and by the Nixon Administration -- and were accompanied by loud accusations that Nixon as "rolling back" civil rights enforcement. Glazer makes clear that readers of the press during that era would have had great difficult understanding that intent standards were being replaced by quotas and "effects tests". A similar process is underway in regard to S. 2568 which would accomplish a virtual sea-change in the Federal role, but which is still understood as simply making "technical" changes restoring the status quo ante. Moreover, it must be clearly understood that the proposed restrictions of local and private options work both ways. Under S. 2568, the District of Columbia's quota requirements for participation in redevelopment projects and cable television would clearly be subject to challenge by the Department of Justice (and private litigants) under Title VI -- as would a host of other activities of States and localities which may be arguably defined as "reverse discrimination". Likewise, Walter Williams and other libertarians would have a statutory basis for challenging local licensing requirements (such as the New York taxicab medallion system) in court -- and court ordered payment of legal fees by the municipalities could become as important a source of income to the growing number of conservative public interest law firms as it currently is to their liberal counterparts. Operation P.U.S.H., the Urban League, and other recipients would similarly become vulnerable to suits by private litigants who detected "reverse discrimination" in any of their activities.

9. The announced refusal of the bill's cosponsors (reflecting an agreement among advocacy groups) to consider any amendments whatsoever should suffice to indicate that more than "tèchnical changes" are at stake. We should not permit such far-reaching changes to occur by default. Rather, we need to insist that they be subjected to thorough examination and open debate. This is our minimal responsibility in dealing with a bill which in its current form is clearly in need of debate and amendment. The broad establishment of jurisdictional vulnerability to suit, coupled with an equally broad jurisdictional grant of power to parties enabled and required to sue -- with no legislative standards defining the outcomes -- merely cedes to courts and Federal bureaucracies what Congress and State and local governments have the responsibility to accomplish.

10. Joint hearings on S. 2568, chaired by Congressmen Perkins and Edwards, are scheduled to begin as early as next week. Administration witnesses from Justice and Education have been asked to testify on May 22. We thus have a short time frame to define an Administration position before the House. (Senator Hatch is reportedly in the early stages of determining the nature and timing of Senate hearings on the bill.)

11. The process of establishing an Administration position will require at a minimum a Cabinet Council meeting, and I strongly urge that the Cabinet Council on Legal Policy secretariat be immediately tasked with setting one up.

Attachment

The Washington Post, May 2, 1984

Bureaucrat, Beware

IF YOU'RE an official of the federal government whose work involves making grants to state and local governments or private organizations, you will be interested in an action taken by the Supreme Court this week. The story begins in 1975 when a group of plaintiffs—six blacks, six women and an organization called the National Black Police Association—sued four officials of the Justice Department, claiming that their civil rights had been infringed because the Law Enforcement Assistance Administration provided grants to some police departments that discriminated. This is not a suit against the government but a personal civil action against four individuals—former attorney general Edward Levi and three LEAA officials—seeking $20 million in damages from the defendants' own pockets. This week, the Supreme Court refused to hear argument on whether this suit should be thrown out of court, so the case goes back to District Court for further proceedings and, eventually, for trial.

There are many reasons for a court to find that the suit has no merit. LEAA officials had a number of options for dealing with discrimination by grant recipients, and they took many of them. Suits were filed against some departments, multiple reviews were conducted and concessions were made by recipients. Plaintiffs acknowledge all this but have chosen to sue because a specific remedy—fund cutoff—was not pursued. On the facts, Mr. Levi and his codefendants have a good case.

But a serious policy question is also presented here: should a government official be held personally liable for acts that were not illegal or even negligent but, on the contrary, were clearly within an area of discretion required by his job? Plaintiffs in this case do not even allege that the officials acted with any discriminatory intent. In their brief requesting the Supreme Court to dismiss the suit, the defendants describe the issue clearly. "Numerous important federal programs involve the distribution of funds to agencies of state and local governments," they point out. "These programs would be substantially affected if, as the court of appeals appears to have held, the Constitution is violated whenever any funds reach any recipient agency that is known to have discriminated—even if the discrimination consists of a minor incident, the funding program serves important social objectives, and the responsible officials are taking other steps to remedy the discrimination. Indeed, under the court of appeals' approach, officials throughout the government who act with entirely proper purposes in distributing funds and enforcing the civil rights obligations of recipients can be faced with lengthy, burdensome proceedings and the threat of ruinous personal liability."

The kind of personal harassment illustrated by this suit is unfair and costly to the defendants, even if they win. It also has the potential for crippling federal grant-making programs. There are better ways to enforce civil rights laws—ways that do not endanger government workers who are trying conscientiously to do a good job.

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June 14, 1984

Honorable Jake Garn
United States Senate
Washington, D.C. 20510

RE: WHAT THE CIVIL RIGHTS ACT OF 1984 (S. 2568)
MAY MEAN FOR THE PRIVATE SECTOR

Dear Senator Garn:

A member of your staff has asked the Policy Committee for an analysis of S. 2568, the Civil Rights Act of 1984. The enormity of the subject precludes a comprehensive analysis, particularly in the time available. (The bill was introduced April 12, 1984 (together with its companion bill, H.R. 5490), and has already been favorably reported by two House committees. Mark-up in the Senate Committee on Labor and Human Resources is expected this month.)

This analysis, therefore, focuses on S. 2568's potential impact on the private sector. Regulation of private activities raises profound and intricate questions of public policy, and such questions are bountiful in this bill. Further, claims and counterclaims about the bill's effects on segments of the private sector—from merchants and farmers to bankers, educators, and landlords—are a knot of contradictions. Our analysis is limited to the private sector because that is where we have found the most interest and anxiety.

I. THE INTERRELATIONSHIP OF THE STATUTES

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, *et seq.*, Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, *et seq.*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, and the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101,*et seq.*, each prohibit discrimination in "any program or activity receiving federal financial assistance." Respectively, the statutes prohibit discrimination on the basis of "race, color, or national origin," "sex," "handicap" ("otherwise qualified handicapped individual"), and "age." Title IX is limited to education programs.

Title VI, which is the model for the later enactments, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

activity receiving Federal financial assistance.
42 U.S.C. 2000d (1976).

The courts have consistently held that the statutes are interrelated—that comparable language evidences a common meaning and intent. A judicial construction of one statute is often used to interpret another. See, e.g., Northcross v. Bd. of Education, 412 U.S. 427, 428 (1973).

In the Grove City case, infra, the Supreme Court construed the "program or activity" language of Title IX. This authoritative interpretation of Title IX is likely to control Title VI, Section 504, and Age Discrimination Act (ADA) cases as well, although we can only speculate on the precise effects.

II. THE GROVE CITY CASE

Grove City is a private, coeducational, liberal arts college located in Pennsylvania. It describes itself as having "both a Christian world view and a freedom philosophy" and it maintains that these positions are "interrelated."

At the time of the lawsuit, Grove City had about 2200 students. About 140 students were receiving Basic Educational Opportunity Grants (BEOGs) and about 340 students had Guaranteed Student Loans (GSLs). The grants were made directly to the students (the grants were not funneled through the college) through the Department of Education's (ED's) Alternate Disbursement Systems (ADS). (Institutions participating in ADS must make certain certifications to ED, but the Department itself calculates the awards and makes disbursements directly to eligible students. ED also operates the Regular Disbursement System (RDS). Under RDS, ED estimates the amount of money that an institution will need for grants and advances that sum to the institution, which then selects recipients, calculates the amount of the grants, and disburses the funds.) Student loans are guaranteed by the federal government.

"Apart from this indirect assistance, Grove City has followed an unbending policy of refusing all forms of government assistance, whether federal, state or local. It was and is the policy of this small college to remain wholly independent of government assistance, recognizing—as this case well illustrates—that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished." Grove City College v. Bell, — U.S. —, 104 S. Ct. 1211, 1223 (1984) (Powell, J., concurring).

ED concluded that Grove City was a "recipient" of "Federal financial assistance" as those terms are defined by Title IX's regulations, 34 CFR Part 106. Grove City was informed that as a recipient it must execute an Assurance of Compliance form. Grove City refused to execute the document, and ED began administrative proceedings which resulted in an order terminating assistance to Grove City's students. The Administrative Law Judge concluded that student grants and loans constituted indirect federal financial assistance to Grove City.

The Administrative Law Judge also found that, "[T]here is not the slightest hint of any failure to comply with Title IX, save the failure to submit [the compliance form]. This refusal is obviously a matter of conscience and belief." Id. at 1224.

The District Court

Following the adverse administrative ruling, Grove City and four of its students commenced an action in federal district court. The district court held that the BEOGs were federal financial assistance, but it refused on several grounds to terminate the students' aid. Grove City College v. Harris, 500 F. Supp. 253 (1980).

Interestingly, ED had sought to terminate the students' BEOGs and their GSLs. The district court held that GSLs were "contract[s] of insurance or guaranty" that could not be terminated because of the express exclusion of such contracts under sec. 902 of Title IX. ED did not challenge this conclusion on appeal. However, ED's initial attempt to have GSLs declared "Federal financial aid" has important implications that will be discussed below. (Note that between the district court decision and the appellate court decision there was a change of national administration. See also, 104 S. Ct., at 1216 n. 10.)

The Court of Appeals

The court of appeals reversed. 687 F.2d 684 (3rd Circ. 1982). The court held that Title IX was triggered by indirect as well as direct aid and that ED could withhold grants from Grove City's students, despite the fact that Grove City had never discriminated. The appeals court recognized that Title IX is program specific, but held that the entire institution is the program:

> Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." Were it otherwise, and if it had to be demonstrated that each individual component of an integrated educational institution had in fact received the particular monies for a particular purpose, no termination sanction could ever effectively be imposed.

Id. at 700.

The Supreme Court

The Supreme Court held that Grove City, through its students who receive BEOGs, is a recipient of federal funds:

> The linchpin of Grove City's argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of section 901(a).

104 S. Ct., at 1217.

> [W]e have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.

104 S. Ct., at 1220.

The Court also held that ED could terminate the BEOGs if Grove City failed to execute the Assurance of Compliance. Termination need not be preceded by a finding of discrimination. Id. at 1222.

Grove City's First Amendment defense was summarily rejected. Id. at 1223.

The Court was unanimous in each of the holdings above.

Six members of the court held that Title IX is indeed program specific, and that "program" does not mean an entire school:

> We conclude that the receipt of BEOGs by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.

Id. at 1222.

The reasoning of the majority's opinion is noteworthy:

> To the extent that the Court of Appeals' holding . . . rests on the possibility that federal funds received by one program or activity free up the College's own resources for use elsewhere, the Court of Appeals' reasoning is doubly flawed. First, there is no evidence that the federal aid received by Grove City's students results in the diversion of funds from the College's own financial aid program to other areas within the institution. Second, and more important, the Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is

> inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.

Id. at 1221 (White, J., writing for the majority).

It is precisely this result that S. 2568 will reverse.

If S. 2568 is enacted, an entire school will be subject to Title IX merely because one of its students receives a small BEOG or because one of its departments receives an earmarked federal grant.

The Grove City majority addressed itself to a recurring question in the debate about S. 2568: Can a line be drawn between BEOGs, for example, and food stamps and similar benefits? Said the court:

> Grove City's attempt to analogize BEOGs to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately received federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individuals' eligibility for general assistance is not tied to attendance at an educational institution.

Id. at 1218 n. 13.

The court also said, "Student financial aid programs, we believe, are sui generis." Id. at 1221.

The court's four-part test, as useful as it is, cannot answer many of the questions that S. 2568 raises. To begin with, S. 2568 will introduce new legislative history and new statutory language. This new language treats "indirect recipients" and "ultimate beneficiaries," for just two examples, more expansively than did the old language. Second, many of the questions raised by S. 2568 do not concern food stamps, Social Security, and similar programs. Part VI of this letter discusses ten areas of the private sector that may feel the effects of S. 2568. Not one of these areas involves a food stamp recipient or a Social Security beneficiary. Third, since student aid programs are sui generis, the test may also be unique. Fourth, the court's formula depends on the particular facts and purposes of the federal financial aid. In Grove City, by means of the four-part test, the court was able to differentiate special-purpose aid (BEOGs) from general-purpose governmental assistance. Using the same test, but applying it to different special-purpose programs (airport construction assistance, research grants, on-the-job-training programs, etc.) which have their own facts and legislative history that will be augmented by the language and legislative history of S. 2568, a different result may be reached.

III. S. 2568

Senators Kennedy and Packwood introduced S. 2568 on April 12, 1984. It was referred to the Senate Committee on Labor and Human Resources. There has been one day of hearings in a Labor subcommittee, and two days of hearings in a Judiciary subcommittee. This week, the Agriculture Committee considered its application to the farming community. The full Labor Committee may mark-up the bill this month. S. 2568 has more than 60 cosponsors.

In the House, the companion bill (H.R. 5490) was jointly referred to the Judiciary Committee and the Education and Labor Committee. Joint hearings were held and both committees have, by unanimous votes and without amendment, ordered the bill reported. As this letter is being written, the reports are not available.

The most authoritative guide to the purposes of S. 2568 (other than the bill itself, which is not here ignored, see below) is a "Joint Explanation by Senator Kennedy and Senator Packwood of Civil Rights Act of 1984," 130 Cong. Rec. S 4585-87 (daily ed. April 12, 1984) [hereinafter cited as "Joint Explanation"]. The quotation below is from the "Joint Explanation" and titled, "What the Bill Does":

> This bill makes three limited changes designed to restore Title IX, Title VI, Section 504, and the ADA to their intended force and coverage. Congress always intended that these crosscutting antidiscrimination statutes, and the various other federal funding statutes which contain additional prohibitions on discrimination in the particular federally assisted programs or activities created by each law, be interpreted to have broad coverage. The changes in all four laws are consistent, to preserve the existing

> parallels among them.
>
> First, the general prohibition language in each statute is modified to delete "program or activity" and substitute the term "recipient." The effect of this change is to prohibit an entire institution or entity from discriminating if any of its parts receives federal funds. With respect to Title IX, the limitation to education is retained.
>
> Second, a definition of the term "recipient" is added to the four statutes. This definition is modeled on the definition currently contained in the regulations issued under these laws. These statutes have consistently been interpreted to exempt from coverage as "recipients" the landlord whose tenant pays the rent with federal public assistance funds, the clothing store that is paid for a shirt with money from a Social Security check, and others similarly situated. This bill makes no change in this regard.
>
> Third, the enforcement section of each of the laws is modified to delete "program or activity" language. . .

Id. at S 4586.

The third purpose of the bill, modification of the enforcement mechanisms, will not be analyzed in this letter.

Nor will this letter dispute the frequent claim that S. 2568 *"restore[s]"* the statutory "force and coverage [that] Congress always intended," although this claim is doubtful. As measured by the constructions of the federal courts, Congress's intent seems to have been for the phrase "program or activity" to mean program or activity, not institution. *See, e.g.*, *Grove City College v. Bell, supra* (sex discrimination); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (sex discrimination); *Hillsdale College v. Dept. of Health, Education and Welfare*, 696 F.2d 418 (6th Cir.1982), *vacated and remanded in light of Grove City*, 52 U.S.L.W. 3700 (U.S. Mar. 26, 1984) (sex discrimination); *Rice v. President & Fellows of Harvard Coll.*, 663 F.2d 336 (1st Cir.1981), *cert. denied*, 456 U.S. 928 (1982) (sex discrimination); *Bd. of Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir.1969) (race discrimination); and *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir.1980) (handicap discrimination). The cited cases all teach that the relevant statutory language is indeed program specific. *See also*, the unsuccessful amendment of Senator Bayh, no. 398 (requiring institution-wide coverage), 117 Cong. Rec. 30156 (1971). The unsuccessful 1971 amendment was of course succeeded by the successful 1972 amendment, the program-specific Title IX.

"Recipients" Under S. 2568

For each of the four statutes, S. 2568 proposes to omit "program or activity" language and replace it with language broad enough to wholly encompass any recipient. For example, section 3(a) of the bill will produce the following changes in Section 504, (and the three other statutes are changed similarly) [Omit the language that is in brackets and insert the language that is underlined]:

> [29 U.S.C. 794] (a) No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of [his] such individual's handicap, be excluded from the participation [in], be denied [the] benefits [of], or be subjected to discrimination [under any program or activity receiving] by any recipient of Federal financial assistance or [under any program or activity conducted] by any Executive agency or by the United States Postal Service. . . .

There is very little dispute about the meaning of the proposed changes from "program or activity" to "recipient." Some think the change is unwise, or that it needs redrafting to solve this or that problem, but its meaning is relatively clear: It will mean at least that "an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant." 104 S. Ct., at 1221.

There are other changes that S. 2568 proposes to make that are not so clear.

For each of the four statutes, S. 2568 proposes to define "recipient" within the statute itself. Until now, "recipients" have been defined only in the regulations. S. 2568 proposes a uniform definition of "recipient" for each of the four statutes although the regulatory definitions have differed somewhat. S. 2568 proposes:

> (b) For the purpose of this section, the term "recipient" means—
>
> (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization or entity), and
>
> (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a

> person), or which receives support from the extension of Federal financial assistance to any of its subunits.

S. 2568, 98th Cong., 2d Sess., sec. 3(b) (1984). *See also*, S. 2568's secs. 2(b), 4(e)(3), and 5(c) which differ slightly only in the words preceding "'recipient' means—".

Note that "recipient" includes "any . . . *private* agency, institution, or organization" which receives federal support, directly or indirectly. (Emphasis added.) S. 2568's effects on private institutions are the theme of this memorandum.

IV. ADMINISTRATIVE AND CONGRESSIONAL DEFINITIONS ARE NOT INTERCHANGEABLE

It is incorrect to assume that there would be no juridical changes even if S. 2568's proposed statutory definition were identical to the existing administrative definitions. The same words, when uttered by different authority, do not have the same meaning. Judges know the difference between administrative words and words that Congress has passed and the President has signed. A court has substantially more authority to invalidate or restrict regulations than to narrow or void a statute.

A discussion of the authority of administrative rulemakers is beyond the scope of this paper, but for some of the general rules, see Davis, Administrative Law Treatise, sec. 7:8 (2d ed. 1979), quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

For a particularly exuberant application of the general rules to a relevant case, see *Univ. of Richmond v. Bell*, 543 F.Supp. 321, 330 (1982) (invalidity of Title IX regulations).

See also, Cooper, Administrative Agencies and the Courts, 294-297 (1951) (regulations are invalid if they exceed conferred authority, conflict with the statute, extend or modify the statute, have no reasonable relationship to the statutory purpose, or violate due process of law).

But see, *Guardians Assn. v. Civil Service Comm. of the City of New York*, — U.S. —, 103 S. Ct. 3221 (1983) in which five justices upheld *disparate impact* regulations under Title VI although three of those justices found that proof of discriminatory intent is required by the statute itself. For divergent views on regulatory authority under Congressional grants of power, see the Guardians Assn. opinions of Justice O'Connor (concurring) and Justice Stevens (dissenting).

If we get a new statute, we are also likely to get new regulations. And new regulations will extend the new statute as the old regulations extended the old statute.

V. THE KEY DIFFERENCES BETWEEN CURRENT REGULATORY DEFINITIONS OF "RECIPIENT" AND THE PROPOSAL IN S. 2568

The language of S. 2568 is "modeled on the definition currently contained in the regulations issued under these [four] laws." "Joint Explanation," supra. S. 2568's definition is "modeled" on the regulations, but it is not identical to them (as I have heard some people say). Indeed, the regulations themselves differ so it would be impossible for S. 2568 to use one definition of "recipient"—as it does—and be identical to differing regulations.

S. 2568 takes regulatory definitions and makes them statutory. This action alone is not without juridical effect (see Part IV). But S. 2568 also changes the regulatory definitions, raising doubts about the intended effect of S. 2568: If S. 2568 is intended to do no more than return us to the status quo ante, why is the definition of "recipient" being changed? This question is at the heart of the controversy over S. 2568.

The material differences between the current definitions and the proposed definition are considered in this section. A side-by-side comparison of the definition of "recipient" as found in the current law and regulations and in S. 2568 can be seen in Appendix A. (Throughout this letter the regulations referred to are always those of the Department of Health and Human Services (HHS) or the Department of Education (ED) unless otherwise indicated. However, all federal agencies that provide federal financial assistance are responsible for enforcing nondiscrimination requirements and many have issued regulations.)

A. Deleting "Program or Activity"

In each of the four statutes, "program or activity" will be changed to "recipient." This single action does not by itself change the definition of "recipient," but it does change the context in which the word is found. Since words are often construed by reference to their contexts, we can expect this change, which at first glance seems not to be definitional, to affect the word's meaning:

> The first thing one has to do . . . in construing words . . . is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural and ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: "In this state, in this context, relating to this subject-matter, what is the true meaning of the word?"

Re Bidie, Ct. of App., 2 All E.R. 995, —— (1948).

B. Omitting "Ultimate Beneficiaries"

The three H.H.S. regulatory definitions, but not ED's definition, exclude from the meaning of "recipient" the "ultimate beneficiary of the assistance" (ADA and Sec. 504) and "any ultimate beneficiary under any such program" (Title VI). S. 2568 omits this phrase.

I do not believe the omission is anywhere explained.

Does the omission mean that under S. 2568 "ultimate beneficiaries" will be included within the definition of "recipient" and prohibited from discriminating? An "ultimate beneficiary" is a tenant paying a landlord with public assistance funds or a person buying a shirt with a Social Security check. *Cf.*, "Joint Explanation," *supra*.

Regarding the meaning of "ultimate beneficiaries," the courts have said, "There are clear congressional statements that discrimination on the grounds of race, color, national origin or handicap against the ultimate beneficiaries of federal financial assistance is unlawful." *N.A.A.C.P. v. Wilmington Medical Center*, 453 F. Supp. 330, 339 (D.Del.1978), *rev'd on other grounds*, 599 F. 2d 1247 (3rd Cir.1979). The footnote to the quoted sentence cites the H.H.S. regulations and says, "An 'ultimate beneficiary' is not to be confused with a 'recipient'." *Id*, at n. 34.

"The 'ultimate beneficiary' of federal financial assistance within the meaning of Section 504, and the . . . regulations promulgated thereunder, is the intended class of beneficiaries under the Section, handicapped individuals." *Nodleman v. Aero*

Mexico, 528 F. Supp. 475, 489 n. 21 (C.D.Calif.1981) (handicapped person, not airline, is "ultimate beneficiary" of federal aid to airports). *See also*, *United States v. Baylor U. Medical Center*, 564 F. Supp. 1495, 1498 (N.D.Tex.1983) (eligible Medicaid and Medicare patients, not hospital, are "ultimate recipients").

Three of the four sets of regulations have made it clear that ultimate beneficiaries, i,e., the intended class of beneficiaries, were not to be regulated. But S. 2568, which is "modeled" on the regulations, does not exlude the classes of intended beneficiaries. Does this mean they are included?

This is the kind of question that has raised serious doubts about the meaning of S. 2568.

(See also, subpart D, *infra*, receiving federal financial assistance "directly or through another entity or a *person*.")

C. Incorporating the "Trickle Up Theory"

Under past practice, a "recipient" was any entity that received federal financial assistance either "directly or through another recipient." S. 2568 will expand this definition such that "recipient" will mean any entity receiving direct or indirect assistance "or which receives support from the extension of Federal financial assistance to any of its subunits."

Under past practice, subunits have been covered whenever the main recipient has received federal financial assistance. S. 2568 will maintain that practice (albeit enlarging the coverage from programatic to institutional) *and* cover the main recipient whenever any subunit receives federal financial assistance.

The implications of this change can be seen in cases such as *Miller v. Abilene Christian U. of Dallas*, 517 F. Supp. 437 (N.D.Tex.1981), which is discussed in greater detail below. *Miller* asked whether the Dallas campus of a private university was covered under Section 504 when it had received no federal funds but the Abilene campus had. *Miller*'s answer was "no."

The "trickle up theory" of S. 2568 may produce an opposite answer.

D. Redefining "Indirect Recipients"

In the cases that follow, no concept is more important than "indirect aid." Indirect aid is what goes to indirect recipients, and the new definition for "indirect recipient" will perhaps broaden the definition of indirect aid.

Currently, a "recipient" will receive federal financial assistance "directly or through another recipient." Under the bill, "recipients" will receive federal financial assistance "directly or through another entity or a person." Since an entity is anything that exists, the possibilities for expansive interpretations are endless.

Judges have been asked to draw lines between direct and indirect aid, between direct and indirect recipients. In the cases that follow, judges have answered with remarkable skill. They have held that a baseball team is not a recipient merely because it leases a stadium from a city that is. They have held that an airline is not a recipient although the federal government pays for air traffic controllers and airport improvements. Such questions will be problematic indeed if S. 2568 is enacted.

E. Omitting "Persons"

Under current regulations, "persons" receiving federal financial assistance are covered by nondiscrimination rules; under S. 2568 they are not. This omission seems incongruous.

> . . . The absence of the word "person" from the definition of recipient could reduce the scope of coverage of the statute. If a person, not incorporated as a business or as another entity, and entirely unconnected with a recipient as defined by the bill, receives federal financial assistance to conduct activities, those activities presumably are not covered by the bill. Because so much federal aid is provided to entities falling within the bill's definition of "recipient," this omission may not have very much practical significance. Congressional intent with respect to such "persons" receiving federal aid, however, should be clear.

Testimony of Linda Chavez, Staff Director of the U.S. Commission on Civil Rights, before the Subcomm. on the Constitution of the Senate Judiciary Comm., 98th Cong. 2d Sess. 4-5 (May 30, 1984) (mimeo).

It may be that this omission has something to do with the issue of "ultimate beneficiaries," outlined in subpart B, *supra*. If so, the connection is obscure.

Or it may be that the omission has something to do with the *Soberal-Perez* cases. *Soberal-Perez v. Schweiker*, 549 F. Supp. 1164 (E.D.N.Y.1982), *aff'd Soberal-Perez v. Heckler*, 717 F. 2d 36 (2d Cir.1983) (Title VI does not cover direct federal aid programs such as Social Security).

It may be that the omission concerns something else. Or it may be that it concerns nothing at all.

VI. IMPLICATIONS OF S. 2568 FOR TEN AREAS OF THE PRIVATE SECTOR

Recent decisions under Section 504, the ADA, Title VI, and Title IX are reviewed in this Part in order to understand the changes that might occur after passage of S. 2568. This review concentrates on cases dealing with the definition of "recipient" because S. 2568's primary effect is to change the meaning and operation of that word. As might be expected, several other issues also appear in the cases.

Nearly all of the following cases arise under Section 504. The great bulk of litigation in the relevant areas (Who is a recipient? What is federal financial aid?) is taking place under Section 504.

There is an interrelationship between the definitions of "federal financial assistance" and "recipient". Under the statutes, and the regulations, coverage is extended to agencies and institutions which receive federal financial assistance, directly or indirectly. Therefore, coverage can be enlarged by redefining _either_ agencies and institutions _or_ federal financial assistance _or_ indirect aid, or by using any combination of redefinitions. For example, in _Angel v. Pan American Airlines_, _infra_, the court was asked to find that Pan American was a "recipient of federal financial assistance" because it benefits from federally-employed air traffic controllers and other federal aid. The court answered the question in the negative. An opposite result would have been reached if _either_ federal aid were redefined to include the undeniable benefits obtained by airlines from air traffic controllers _or_ recipients were redefined as agencies or institutions which do not receive direct federal grants but which do benefit from indirect federal expenditures which, for example, constitute unique aid to an identifiable industry. The interplay among these definitions can be seen throughout the cases.

Two regulatory definitions of "federal financial assistance" can be seen in Appendix B.

A majority of the holdings in the following cases probably would have been impossible, or at least highly unlikely, had the cases been decided under the statutory language of S. 2568. The holdings in the remaining cases are less likely to have been changed by S. 2568, but the bill will change the development of the law even in these areas. If I am right about the potential effects of S. 2568 on these cases, then the bill's impact on the private sector will be vast.

A. Professional Societies

Bachman v. Am. Soc'y of Clinical Pathologists
577 F. Supp. 1257 (D.N.J.1983)

The Society is a non-profit medical society organized under the laws of Illinois. The Society's Board of Registry periodically gives an examination to those candidates who have completed the educational requirements established by the Board. Successful candidates are certified by the Board. Certificates must be renewed annually.

Bachman sought certification as a medical technologist. She requested a reader and extra time for the examination because of her dyslexia which made reading difficult. The Board denied her request.

Bachman sued the Society alleging a violation of Section 504. In 1977 and 1978 the Society had received two federal grants to conduct seminars on alcohol abuse, and to publish the proceedings. The grants came during the time that Bachman complained of discrimination.

The court held that "past recipients of federal financial assistance . . . are liable for violations of the Rehabilitation Act which occurred during the time that they were recipients." Id. at 1262.

The court also found that the Society was a "recipient of federal financial assistance," but that the program which allegedly discriminated against Bachman was not in any way related to the program receiving federal funds. Even in the face of the Third Circuit's decision in Grove City (the entire institution is the program or activity), the Bachman court held that the seminar funds did not constitute institutional aid because "the federal grants were directly awarded for and applied to specific activities of [the Society] and were not used generally to support the organization." Id. at 1263.

The court emphasized that the grants were earmarked for certain purposes, that those purposes were unrelated to the alleged discrimination, and that Section 504 was program-specific.

S. 2568, which would apply Section 504 to the organization as a whole, would probably overturn Bachman.

(The Bachman court also refused to define tax exempt status as indirect federal financial assistance within the meaning of the regulations. Id. at 1263-65.)

See also, Nat'l Collegiate Athletic Ass'n v. Califano, 444 F.

Supp. 425, 430-31 (1978), rev'd, 622 F. 2d 1382 (1980) (private athletic association).

B. Private Education

Miller v. Abilene Christian Univ. of Dallas
517 F. Supp. 437 (N.D.Tex.1981)

Miller claimed that his employment with the University's Dallas campus was ended in violation of Section 504. The University enrolled students who received various federal grants and loans, but neither Miller's department nor the Dallas campus received any direct federal aid. (The University's Abilene campus had received six federal grants for biology research, math training and social work.)

The Court held,

> . . . Miller has failed to allege or raise an issue of fact that would establish that he was a participant in a program or an intended beneficiary of a program or activity that receives federal assistance. [F]ederal funds were not used to employ Miller. Nor does he allege that the discriminatory employment practices allegedly directed at him (a non-beneficiary) affected any participants in or beneficiaries of the federal assistance.

Id. at 439.

The Miller court rejected the argument that federal funds in one part of an institution "free up" funds for use elsewhere. Cf. id. at 440 with Grove City Coll. v. Bell, supra at 1221.

S. 2568's institution-wide coverage and the "trickle up theory" implied by S. 2568's language would make a holding like Miller's unlikely after the bill's enactment.

CAUTION: The result in Miller, and all other Section 504 employment cases, will be affected by Consolidated Rail Corp. v. Darrone, — U.S. —, 104 S. Ct. 1248 (1984), which held that in Section 504 employment suits the federal financial assistance need not have been provided for the primary purpose of providing employment. Still, Darrone seems less likely than S. 2568 to reverse Miller.

See, also, Garrity v. Gallen, 522 F. Supp. 171 (1981) (defining the "recipient" of federal aid as the public school which housed the federally aided program, not the entire school system) and Ferris v. Univ. of Texas at Austin, 558 F. Supp. 536 (W.D.Tex.1983) (public university which received federal aid, but not its shuttle bus system which did not, was a "program" within the meaning of Section 504).

Private sector educators have raised an alarm about S. 2568. For example, Bruce C. Hafen, President of Ricks College and the American Association of Presidents of Independent Colleges and Universities; George Roche, President of Hillsdale College; and Charles S. MacKenzie, President of Grove City College have all testified against the measure. (The educators have been primarily, but not exclusively, interested in Title IX.) See, also, Oaks, "A Private University Looks at Government Regulation," 4 Jn. Coll. & Univ. Law 1 (1976).

Considering that Title IX regulations control such decisions as abortion coverage under school-provided health plans, whether a school can have separate men's and women's athletic teams, and, until recently (47 Fed. Reg. 32526 [July 28, 1982]), student dress codes, it is not surprising that private educators are showing such interest in the bill.

C. Manufacturing

Simpson v. Reynolds Metals Co.
(629 F. 2d 1226 (7th Cir.1980)

Simpson worked at a Reynolds plant in McCook, Illinois. Simpson admits that he has an alcoholism problem that dates back to 1948. The problem was known to Reynolds.

Simpson was suspended for missing three days of work because of his drinking. He was conditionally reinstated after he reached an agreement with his employer. The agreement required Simpson to regularly attend Alcoholics Anonymous meetings and specified that any future unexcused absences would be cause for dismissal.

Plaintiff was again absent for three days because of his alcoholism and Reynolds suspended him. Simpson appealed the suspension but lost his appeal and was discharged. He sued under Section 504.

Reynolds maintained that it was not a recipient of federal financial assistance. However, Reynolds has entered into procurement contracts with the federal government and the company operates certain apprenticeship or on-the-job training programs at its McCook plant with federal funds. (Simpson was never a participant in these OJT programs.) Reynolds further said that the OJT program did not provide a benefit to it, but are benefits to the trainees. Reynolds stated that it has followed a strict policy of refusing federal financial assistance because of "the onerous reporting requirements accompanying such federal assistance." Id. at 1229.

Simpson asked the court to embrace what he called a "unified entity approach" in defining what constitutes "the program or activity receiving Federal financial assistance." Under the "unified entity approach," "once some part of an entity becomes involved in a program or activity receiving federal financial assistance, the employment practices of the entire institution would be subject to the coverage of Section 504." Id. at 1233 n. 12. The court rejected the "unified entity approach," an approach that sounds remarkably like the approach of S. 2568.

The court sustained the dismissal of the action against Reynolds because the plaintiff had failed to show a connection (a nexus) between his discharge and the federal assistance. Id. at 1232. Therefore, the court did not reach the question of whether the OJT programs or procurement contracts constitute federal financial assistance. Presumably, this obstacle has now been removed, Consolidated Rail Corp. v. Darrone, supra, and a court will have to reach the question of "recipient." S. 2568 will likely remove any additional obstacles.

Reynolds Metals shows that S. 2568 may have the unintended effect of decreasing opportunities for the very populations it seeks to serve. On the basis of the Reynolds Metals evidence, it appears that the company will not participate in OJT programs if such programs make the company a "recipient of Federal financial assistance."

D. Professional Sports

Disabled in Action v.
Mayor & City Council of Baltimore
685 F. 2d 881 (4th Cir.1982)

The City of Baltimore and the Baltimore Baseball Club (the Orioles) were sued by certain disabled persons for failing to make modifications in Memorial Stadium. The Orioles are the primary lessee of the stadium. The modifications affected seating, ramps, parking, restroom facilities, drinking fountains and telephone booths.

The parties reached a negotiated settlement with the Maryland Commission on Human Relations. All issues were settled before the commission save one: attorneys fees. The federal courts had to resolve that issue.

Defendants sought attorneys fees from the City and the Club, claiming that the Orioles were an indirect recipient of federal financial assistance under Section 504, and the district court agreed:

> The court concludes that defendant Club is included within the scope of [Section 504], as amplified by the applicable regulations, with respect to some, at least, of the facilities in question in this case. While defendant City is a direct recipient of federal financial assistance, defendant Club is an immediate

> indirect beneficiary of the assistance received by defendant City. The regulations state that the federal financial assistance can be received "directly or through another recipient." It is clear that since the Club is the major tenant of the Stadium it is the greatest and most immediate beneficiary of federal aid given to the City which is used for Stadium improvement. Therefore, defendant Club is included within the scope of [Section 504].

Disabled in Action v. Mayor & City Council of Baltimore, civil no. T-79-1749, at 15 (D.Md., July 14, 1981).

The Orioles are not, of course, the exclusive lessee of the stadium. (In happier times the Colts used it.) The stadium is used for other activities, public and private. Are only "major tenants" such as the Orioles "indirect recipients"? Or are other tenants "indirect recipients," too?

For now, the question is academic because the court of appeals reversed the district court.

> [I]t is plain that the City is no mere conduit of federal assistance to the Club. [T]he benefits of federal assistance have accrued both to the direct recipient . . . and to another entity . . . which shares in those benefits by virtue of business dealings with the direct recipient. If the Rehabilitation Act extends to such indirect beneficiaries of federal largesse, consistency would demand that it apply to every customer of every enterprise subsidized by the federal government. Nothing in the language or legislative history of the Act indicates a congressional intention to reach so far.

685 F. 2d, at 884-85.

Conversely, the language of S. 2568, which perhaps will be the language of a new statute, indicates that a recipient is a "private . . . organization . . . to which Federal financial assistance is extended (directly or through another entity . . .)." And while it is unlikely that S. 2568 will be construed to "apply to every customer of every enterprise subsidized by the federal government," it does not seem unlikely that it will be extended to lessees or "major tenants," for example.

E. Transportation
Angel v. Pan American World Airways
519 F. Supp. 1173 (D.D.C.1981)

Angel sued Pan American when the airline refused to transport Mr. Angel, who has cerebral palsy and is confined to a wheelchair, from Germany to the United States because he was not accompanied by an attendant.

The complaint stated three causes of action including a violation of Section 504. The airline maintained that it had not received direct federal financial assistance since 1956 when it received a mail-related subsidy.

Plaintiff claimed that Pan American receives numerous indirect federal subsidies which are sufficient to trigger the prohibitions of the Act. These indirect subsidies include air traffic controllers provided by the Federal Aviation Administration, airports constructed with the aid of federal funds, and certain technical assistance.

The court held:

> . . . Subsidies to airports, to be sure, subject those locales to the broad proscription of Section 504, but this does not translate into binding law upon the users of the airports, whether they be commercial airlines or individual passengers. To hold that commercial airlines fall within Section 504 merely because of assistance provided to airports would expand improperly the accepted proposition that Section 504 is *limited to direct recipients of federal funds*.

Id. at 1178 (emphasis added) (citations omitted).

Of course, the current regulations implementing section 504 do not restrict its application to *direct* recipients. And S. 2568, which is "modeled" on the current regulations, does not restrict the definition to direct recipients, either. In fact, S. 2568 expressly *includes indirect* recipients.

See also, *Nodleman v. Aero Mexico*, 528 F. Supp. 475, 488-89 (C.D.Cal.1981).

Insofar as BEOGs and Title IX are concerned, *Grove City* has denied any distinction between direct and indirect *aid*. 104 S. Ct., at 1217. This is not the same as denying a distinction between direct and indirect *beneficiaries*.

F. Food Processing
Rogers v. Frito-Lay, Inc.
433 F. Supp. 200 (N.D.Tex.1977),
aff'd 611 F. 2d 1074 (5th Cir.1980),
cert. denied, 499 U.S. 889 (1980)

A handicapped former employee brought suit against Frito-Lay alleging that her termination had been in violation of Section 504. Frito-Lay is a government contractor.

The district court held that the company was not a "recipient" of federal financial assistance because "[t]he term 'federal financial assistance' as used in [Section 504] does not comprehend government procurement contracts but rather refers to the form of grant assistance that goes primarily to public entities." 433 F. Supp., at 204.

The court of appeals affirmed on other grounds.

Government procurement contracts are treated more thoroughly in the next case.

G. Automobile Rentals
Cook v. Budget Rent-A-Car Corp.
502 F. Supp. 494 (S.D.N.Y.1980)

Cook is handicapped, but says that his impairment does not affect his ability to drive. He has been a licensed driver since 1970. A franchisee of Budget Rent-A-Car refused to rent Cook an automobile, allegedly because of Cook's handicap. Cook sued under Section 504.

Budget receives federal funds only through rental contracts that it has with five federal agencies. The contracts for Budget's goods and services are negotiated at fair market value. Plaintiff alleges that these payments make Budget a "recipient" within the meaning of Section 504.

The court conducted a thorough inquiry into the language, and history of Section 504 and its regulations and concluded that procurement contracts do not constitute federal financial assistance within the meaning of the Act. The regulations explicitly exclude procurement contracts and the court relied heavily on this interpretive aid.

Said the court:

> As the Court reads the DHEW regulation, Budget's government contracts do no constitute "Federal financial assistance." Budget's agreements with federal departments and agencies are undoubtedly "contracts" within the meaning of the regulation. There is no need to decide what the regulation means by the term "procurement contract." The regulation makes it clear that the important question is whether Budget's contracts are arrangements by which the government "provides or otherwise makes available assistance" to Budget. "Assistance" is the crucial word, and is explained by the regulation in a manner which is most illuminating with respect to the present controversy. The regulation says that assistance can include a lease of government property for less than

> its fair market rental valued. [Citation.] Plainly, the inference to be drawn is that assistance does not include transactions where government property is leased for an amount equivalent to its fair market rental value. Since there is no "assistance" under the regulation where the government lets property at its fair market rental value, it is plain to the Court that there is no "assistance" where the government hires property at its fair market rental value. In view of the fact that the instant case is precisely one where the government merely hires property from Budget at its fair market rental value, Budget is not a recipient of Federal financial assistance under the DHEW regulation.

Id. at 497-98 (footnotes omitted).

Budget Rent-A-Car is one of the few cases where the regulations are relied on to exclude a transaction.

In future cases similar to Budget, the outcome will probably depend on new regulations, if any, issued under authority of S. 2568.

H. Medical Insurance
Bernard B. v. Blue Cross & Blue Shield
528 F. Supp. 125 (1981),
aff'd mem., 679 F. 2d 7 (2nd Cir.1982)

Bernard B. and his wife Shirley B. were covered by Blue Cross health insurance as a fringe benefit of the husband's employment. The insurance did not cover psychiatric care in a government hospital. When Shirley B. was admitted to a government hospital for psychiatric treatment, Blue Cross refused to pay her bills which were substantial.

Mr. and Mrs. B. sued Blue Cross, alleging that the failure of the insurance company to cover such psychiatric care was a violation of Section 504. Blue Cross receives Medicare, Part A funds.

Blue Cross had requested permission to include such psychiatric coverage in its contracts, but the request was denied by the Superintendent of the New York State Insurance Department who explained his decision as follows:

> Serious questions arise as to whether community-rated subscribers should be forced to shoulder these additional burdens [for expanded maternity benefits, psychiatric coverage, and hemophiliac care] when the cost of all necessities, including health insurance, has already placed a severe strain on subscribers with low and medium incomes. The problem is further complicated by the fact that there are many other important and beneficial types of medical care that are

> not now covered by Blue Cross. [Alcoholism treatment and pre-natal care are cited in a footnote.] Since the existing source of available financial resources—the consumer's pocketbook—is not limitless, priorities must be established. . . .

528 F. Supp., at 128 n. 7.

There is a tendency to think that only civil rights plaintiffs act in the interests of the underprivileged. Here, of course, and elsewhere, the very action of which the plaintiffs complain was taken to protect the interests of low and medium income subscribers.

Blue Cross moved for summary judgment on the ground that it was not a recipient. On this ground, the motion was denied.

Said the court:

> We cannot say that Blue Cross has established that no genuine issues of material fact remain on this point and that it is entitled to judgment as a matter of law. Blue Cross acts as a conduit for Medicare funds, performing various functions and ultimately distributing the funds. Blue Cross additionally receives payment for administrative expenses. Plaintiffs have raised a genuine issue of material fact concerning the intermingling of Medicare and other Blue Cross funds and lumping of expenses such that federal Medicare funds may play a part in enabling Blue Cross to carry on both Medicare and non-Medicare activities.
>
> . . .

Id. at 132.

Cf, *United States v. Baylor Univ. Medical Center*, 564 F. Supp. 1495 (N.D.Tex.1983) (Medicare and Medicaid funds to a university hospital constitute federal financial aid not excluded by the "contracts of insurance" exemption in the statute).

Blue Cross did win summary judgment on the ground that what it had done was not "discrimination." The court said, "Reasons other than handicap account for the exclusion of the risk[,]" and the exclusion was "substantially justified." 525 F. Supp., at 132.

The court did not have to find that Blue Cross was a recipient to resolve the issues in the case. But in a future case, the court will have to say whether an insurer that receives Medicare funds is a "recipient." S. 2568 is more likely to make the answer "yes."

(For a comment on the treatment of Medicare, Parts A and B under the Age Discrimination Act, see Schuck, "The Graying of Civil Rights Law: The Age Discrimination Act of 1975," 89 *Yale L. J.* 27, 59 n. 165 (1979).)

I. Broadcasting

Gottfried v. Federal Communications Comm'n

655 F. 2d 297 (D.C.Cir.1981)
rev'd in part, sub nom.,
Community Television of S. Calif. v. Gottfried
— U.S. —, 103 S. Ct. 885 (1983)

Gottfried is hearing impaired. She petitioned the Federal Communications Commission to deny the license renewal applications of eight Los Angeles area television stations. (Seven commercial licensees and one public station.) Gottfried said that the stations had failed to meet the needs of the hearing impaired and, "as recipients of valuable federal licenses, had failed to satisfy obligations imposed on them by Section 504." The Commission denied her petitions and Gottfried appealed to the circuit court.

The court concluded that Section 504 applied to the public station, and remanded that issue to the FCC for an appropriate remedy. Section 504 was held not to apply to the commercial stations "[a]lthough the Commission may still be obliged to weigh the national policy of [Section 504] within the pubic interest standard. . . ." 655 F. 2d., at 305.

Said the court:

> Section 504 directly imposes legal obligations only on recipients of "Federal financial assistance." Appellants correctly argue that a license to broadcast on the public airwaves is a commodity of great value. But this does not resolve the question of congressional intent: Did Congress intend broadcast licenses to count as "financial assistance" within the meaning of Section 504? We are unable to conclude that it did.

Id. at 312 (footnote omitted).

In the footnote which is omitted, the court refers to the value of a broadcast license in Los Angeles, the country's most profitable market. (In 1964, it was estimated that the value of an average VHF license was $1.5 million.) The court also quotes Justice Brennan (in dissent), that a free license is functionally equivalent to "Government subsidization of broadcasters." Id. n. 55.

Gottfried will probably be limited to its facts, i.e., broadcasting licenses. Cf. Hafer v. Temple University, 524 F. Supp. 531, 540 n. 12 (1981) (Gottfried "not relevant" to a Title IX athletic department case).

Over the objections of two of its members, the Supreme Court reversed in part, holding that Section 504 does not require a public television station's license renewal application to be judged under a different standard than applies to commercial licensees.

J. Agriculture

> As a general rule, Farm Bureau has not become involved in civil rights legislation. However, we are concerned that the broad, vague, and all-encompassing language contained in S. 2568, particularly in the definition of "recipient" of federal financial assistance, may be an open invitation to the federal bureaucracy and the courts to bring virtually every public activity at all levels of government under the jurisdiction of the several statutes that would be amended by this legislation.
>
> [T]he language in the bill may be interpreted to bring under the regulation of civil rights statutes a large portion of all private sector activity. Even individual farmers and ranchers who are recipients of various forms of public assistance or who "receive support" from government programs may be affected.
>
> . . . The broad language in this bill raises questions as to what impact anti-discrimination regulations would have on such benefits as loan guarantees, commodity loans and price support payments.

Statement of the American Farm Bureau Federation before the Senate Comm. on Agriculture regarding S. 2568, 98th Cong., 2d Sess. 1-2 (June 12, 1984) (mimeo).

VII. CONCLUSION

Notwithstanding the length of this letter, this analysis has been very narrow. After presenting some of the background of Grove City and S. 2568, we looked at a very small group of cases, namely those that dealt with the meaning of "recipient of federal financial assistance" and that had private sector defendants and in which the defendants prevailed. These particular defendants prevailed in these particular cases, but would they have prevailed under S. 2568? This question provides a useful approach to an understanding of S. 2568.

The nine cases in Part VI showed applicants, employees, sports fans, travelers, renters, insured persons, and television viewers suing professional societies, employers (including universities), Orioles, common carriers, franchisors, insurance companies and federal licensees for readers and extra test time, jobs, handicapped seating and airplane seats, cars, particular health insurance coverage, and captioned televison. The defendants were said to be "recipients of Federal financial assistance" because they had unrelated grants, aid at another campus, OJT programs, a stadium lease from a city, airport construction aid and air traffic controllers, procurement contracts, Medicare, and broadcast licenses. Congress is now being asked to readjust the laws that governed those cases.

The civil rights statutes are pervasive (they were intended to be), and they reach deep into the private sector. S. 2568 will extend their reach. This letter has attempted to show how, and how far, that reach might be extended.

Sincerely,

Lincoln C. Oliphant

Lincoln C. Oliphant,
Counsel*

*I wish to thank Katherine B. Smith of the Oklahoma City University School of Law and Michael A. Rosenauer of the Willamette University College of Law for their research assistance.

Appendices attached

TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568 98th Congress 2D Session
42 U.S.C. § 2000d (1982) Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.	45 C.F.R. § 80.13(i) (1983) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. [Department of Health and Human Services regulations]	Sec. 5(c) "For the purpose of this title, the term 'recipient' means — (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568,
20 U.S.C. § 1681 (1982)	34 C.F.R. § 106.2 (h) (1983)	Sec. 2(b) 98th Congress 2D Session
(a) Prohibition against discrimination; exceptions No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . . (c) "Educational institution" defined For the purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.	(h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof. [Department of Education regulations]	"For the purpose of this title, the term 'recipient' means — (A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

SECTION 504 OF THE REHABILITATION ACT OF 1973

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568
29 U.S.C. § 794 (1982) Nondiscrimination under Federal grants and programs; promulgation of rules and regulations No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *	45 C.F.R. § 84.3(f) (1983) (f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee or a recipient, but excluding the ultimate beneficiary of the assistance. [Department of Health and Human Services regulations]	Sec. 3 (b) 98th Congress 2D Session "For the purpose of this section, the term 'recipient' means — (1) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (2) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

THE AGE DISCRIMINATION ACT OF 1975

Present Statutory Language	Present Regulation Definition	Proposed Definition - S. 2568
The Age Discrimination Act of 1975, Pub. L. 94-135, title III, § 301 et seq., (Nov. 28, 1975), 89 Stat. 728 as amended by Pub. L. 95-478, title IV, § 401(a), (Oct. 18, 1978), 92 Stat. 1555. § 302 Statement of Purpose It is the purpose of this title to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.). [see note.] § 303 Prohibition of discrimination Pursuant to regulations prescribed under section 304, and except as provided by section 304(b) and section 304(c), no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance. [Note: In the codification, at 42 U.S.C. § 6101 et seq. (1982), "Chapter 67 of title 31" was substituted for "the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 et seq.)" on authority of Pub. L. 97-258, § 4(b), (Sept. 13, 1982), 96 Stat. 1067.]	45 C.F.R. § 90.4 (1983) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly, or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance. [Department of Health and Human Services regulations]	Sec. 4(e) 98th Congress 2D Session "[T]he term 'recipient' means — (A) any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity (including any subunit of any such State, subdivision, instrumentality, agency, institution, organization, or entity), and (B) any successor, assignee, or transferee of any such State, subdivision, instrumentality, agency, institution, organization, or entity or of any such subunit, to which Federal financial assistance is extended (directly or through another entity or a person), or which receives support from the extension of Federal financial assistance to any of its subunits."

"Federal Financial Assistance" as defined in regulations

45 C.F.R. § 84.3(h) (1983)

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

[Department of Health and Human Services regulations implimenting Section 504 of the Rehabilitation Act of 1973]

34 C.F.R. § 106.2(g) (1983)

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

[Department of Fducation regulations implimenting Title IX of the Education Amendments of 1972]

8 Friday, August 3, 1984 THE WASHINGTON POST

Linda Chavez

Is This Any Way to Protect Civil Rights?

Early this year the Supreme Court handed down a ruling in the Grove City College case that alarmed a good many people concerned with civil rights. They feared that it jeopardized the federal government's ability to ensure that the money it dispensed would not be used to foster discrimination.

Specifically, the court said that civil rights coverage barring sex discrimination in education extended only to those of a school's programs or activities that receive federal aid, and not to all of the school's educational activities.

After the decision, many people, including a majority of the members of the U.S. Commission on Civil Rights, urged Congress to enact legislation that would overturn its effects, which they feared might be to weaken restrictions on federal money going to institutions that discriminate on the basis of sex, race, national origin, age or handicap. Congress responded quickly with legislation—the Civil Rights Act of 1984—that its proponents believed would return the breadth of federal civil rights enforcement to its pre-*Grove City* scope.

Since it was introduced, however, a number of questions have arisen as to whether the bill would not do considerably more than that. (The civil rights commission, incidentally, has not taken a position on this specific legislation.) Some now fear that it represents a vast expansion of federal civil rights coverage, while others maintain it addresses only the change brought about by the Supreme Court's decision. One thing is clear: in its haste to right a perceived wrong, Congress is rushing to adopt legislation so ambiguous that even its most ardent supporters cannot agree on precisely what it means.

Take, for example, the issue of who or what would be covered by the law. Some who have analyzed the bill suggest that even "Mom and Pop" grocery stores would be covered if they accepted food stamps. Such suggestions have been dismissed as "scare tactics." Rep. Don Edwards (D-Calif.), a principal cosponsor of the bill, assured his colleagues in House floor debate that such claims are "ill-founded." Rep. George Miller (D-Calif.) agreed: "A food stamp or Social Security recipient would not bring under coverage, for instance, institutions to which those funds are transferred—such as stores or apartment building owners. The interpretation of these statutes in such cases has been consistent through the years and will not be altered by [the bill]."

Yet Rep. Paul Simon, (D-Ill) another principal sponsor and co-manager of the bill on the floor, strongly asserted otherwise: "Given the factors identified by Justice White [in the *Grove City* case], a supermarket which accepts food stamps is covered; that is, the market has knowledge of and control over whether it accepts food stamps. It must apply to participate in the Food Stamp Program and it must meet certain requirements."

Determining who is to be considered a recipient of federal funds under the new bill is no small matter. Language has been added that did not appear in previous agency regulations, and it seems to mean different things to different people, including its drafters. The new definition would include an entity "which [receives] support from the extension of federal [aid] to any of its sub-units." So what does "support" mean? There are two House committee reports on the bill, and both interpret the definition very broadly, as does Rep. Simon, who has said: "[A] subunit receiving federal assistance will trigger coverage of its parent entity if the federal funds benefit the parent entity; once coverage is triggered the parent entity is covered throughout its operations." Sen. Alan Cranston, (D-Calif.) essentially agreed with Simon, and defined support to include services. But Rep. Edwards once again disagreed, arguing that the term "support" requires "identifiable assistance from the actual federal funds."

Ironically, in at least one instance the sponsors were clear in their intent; they mean to extend coverage far beyond its previous scope. A state government receiving a health grant for its health department would, under this legislation, be covered in *all* its activities if any of the funds went to the governor's office merely to cover administrative overhead related to the grant. Presumably, then, all state licensing boards and commissions, as well as other state agencies and departments, would be covered even if they received no federal funds. If the licensing process for physicians, lawyers, electricians, barbers, etc., produced a disproportionate failure rate among minorities or females, a finding that the state discriminated could result. Prior to *Grove City*, the law had never been enforced so broadly.

Since the bill provides for cutting off federal funds to a recipient found discriminating, arcane matters such as legal definition have important practical consequences. But there is much confusion over just how funds would actually be terminated if a recipient violated a civil rights statute. Rep. Carl Perkins (D-Ky.), chairman of the House Committee on Education and Labor, said that if "discrimination is found, federal funds would be cut off only in the particular part of the institution or entity where discrimination actually exists. For instance, if a college discriminates in its science department and in no other area, federal funding would be cut off for that department, but not for the arts department or the engineering department."

But it is the view of D.C. Del. Walter Fauntroy, another supporter of the bill, that "federal funding would be cut off to the entire institution, and not just to a particular program or activity in which the discrimination is found to have taken place."

The reports of the two House committees that shared jurisdiction on the legislation add to the ambiguity and seem to provide support to either point of view. In any case, the *existing* law is specific and precise: funds may be terminated only in the part of an institution where the discrimination occurs. This portion of existing law was not affected by the court decision and need not be changed to accommodate the interests of those who favor a pre-*Grove City* enforcement mechanism.

The *Grove City* decision came about in the first place because Congress may have meant one thing but said quite another in the original law. It now has an obligation not to make the same mistake twice, and political expediency ought not to win out over good law.

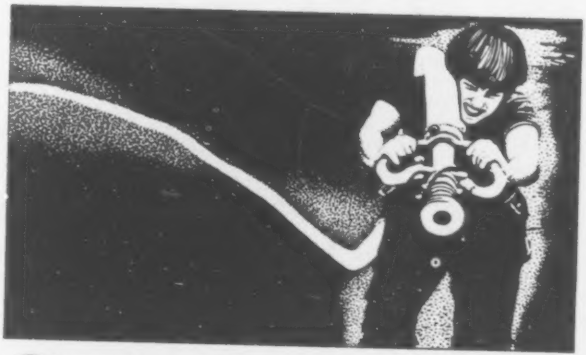
By Zarko Karabatic

The writer is staff director of the U.S. Commission on Civil Rights.

MISSING DEFINITIONS

Congress and Civil Rights

BY DIANE RAVITCH



CONGRESS has moved rapidly on the Civil Rights Act of 1984, intended to give added force to Federal statutes banning discrimination on the basis of sex, handicap, age, race, and national origin. The new bill's principal sponsors—Senators Edward M. Kennedy (D.-Mass) and Bob Packwood (R.-Ore.)—insist that it introduces no fundamental changes, that its only purpose is to restore the rights placed in jeopardy by the Supreme Court's *Grove City College v. Bell* ruling.

According to critics of the *Grove* decision, it leaves institutions free to discriminate in any program or activity that does not receive direct Federal funding. Although that is not an accurate reading, the view has led to a tidal wave of support for strengthening the antidiscrimination laws.

Perhaps more helpful, however, would be an unambiguous declaration from Congress explaining what the civil rights provisions permit and forbid. When the original Civil Rights Act of 1964 was passed, many states and private institutions were engaged in overtly discriminatory practices—excluding persons from participation in publicly-funded programs, for example, solely because of their race or national origin. Thus the meaning of the law was plain. Since that time the Federal Courts, government agencies and institutional administrators have frequently arrived at conflicting interpretations, resulting in unending confusion and contention.

Increasingly, charges of civil rights violations have been based not on proof of intent, but on statistical demonstrations of differences among groups. In New York City, a Federal judge invalidated a written test for city policemen as racially discriminatory because a larger proportion of whites than blacks passed the test. In the same city, a physical test for firefighters was banned as sexually discriminatory because few women could pass it. In the last days of the Carter Administration, a test for

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Civil Service administrators was abolished because the passing rate differed among racial groups. Currently, the Federal Department of Education is charging the university system of Georgia with racial discrimination because more white students than black students pass a state-required graduation test of reading and writing skills.

The banning of discrimination against the handicapped has led to other kinds of problems. The Rehabilitation Act of 1973 requires public and private agencies to provide equal treatment for handicapped persons in Federally-funded programs and activities. At a minimum, this means providing physical access through ramps and elevators for the wheelchair-bound, and other kinds of special aids for those who are deaf and blind. With each passing year, though, the challenges under this law have become more complex. In 1979 the Supreme Court turned down the plea of a deaf woman who sued to enter a nursing program in a North Carolina college, and in 1982 it held that a school district in New York State was not required to hire a sign-language interpreter for a deaf fourth-grader. In a case now before the Supreme Court, a Texas school district is appealing a lower court's order to accept responsibility for catheterizing a handicapped student's bladder.

Uncertainty about how to interpret the civil rights laws sometimes leads to extreme decisions by administrators. In March 1983, for instance, a New York City public school teacher was arrested and charged with pushing a woman to her death in the path of a subway train. A New York *Times* story later reported that the teacher had been repeatedly hospitalized for mental illness. In January, after he shoved a third-grade student's head against a desk in the classroom, the principal sought to dismiss him. But administrative officials at the Board of Education ruled that the teacher could not be ousted for his mental illness because mental illness is a handicap, and discrimination against handicapped persons is illegal.

Each new challenge to the civil rights laws has raised difficult issues, and each case that has been litigated has turned on the question of Congressional intentions. Until the *Grove* decision last February, the legislators had been happy to leave the hard cases for the courts to resolve. This changed after demands for revision of the civil rights laws were spurred by critics' complaints that the Court had "cut the guts" out of Title IX, the law banning sex discrimination. Several Congressmen promptly declared their readiness to override the ruling, and 62 senators have agreed to cosponsor the new act. What exactly did the Supreme Court do to arouse this heated campaign?

THE CASE involved a small coeducational, liberal arts college in Pennsylvania that for over a century had refused all financial involvement with the state or Federal government. Not only did Grove City College reject any direct institutional support; it also declined to participate in any Federal programs that would have made it responsible for assessing students' eligibility for assistance. Some of its students received Federal loans and grants through the "Alternate Disbursement System," which put the students directly in touch with the Federal government and eliminated the college's role as middleman.

Grove City College's quiet nonengagement did not escape the attention of the Department of Health, Education, and Welfare. In 1977 the college was directed to sign a Title IX Assurance of Compliance. If it did not, the Department declared, its students would lose their Federal aid. Title IX prohibits sex discrimination "under any education program or activity receiving Federal financial assistance." The college claimed that it was not a recipient, and that the government could not compel it to sign an Assurance of Compliance.

An administrative law judge ruled against Grove City College, but stated: "It should ... be noted that there is not the slightest hint of any failure to comply with Title IX, save the refusal to submit an executed Assurance of Compliance with Title IX." This placed Grove City College in a position comparable to that of professors in the 1950s who were fired for not signing a loyalty oath, even though no questions were raised about their loyalty.

Contesting the order to sign the statement, the college and four of its students sued in Federal court. They argued that the college was not "receiving" Federal aid, and that the government should not cut off assistance to needy students merely because the college refused to sign the Assurance of Compliance.

By the time the case reached the Supreme Court, there were two major issues to be decided: First, is Grove City College a recipient of Federal aid, despite its not accepting any Federal grants or contracts? Second, if Grove City is a recipient, is the entire institution affected or only the specific "program or activity" receiving Federal dollars? In other words, should the fact that some students receive Federal grants and loans subject the entire institution to the full battery of Federal regulations regarding affirmative action in employment, athletics, counseling, housing, admissions, grievance procedures, and reporting requirements?

Contrary to popular impression, the Supreme Court's ruling was a distinct setback for Grove City College. The Court ruled unanimously that the college *is* a recipient of Federal assistance, and that student financial aid could be terminated if it failed to file an Assurance of Compliance with Title IX. This part of the Court's decision represented a sweeping expansion in coverage, because it provides a rationale for extending the civil rights statutes to private institutions that receive indirect Federal benefits (like nonpublic schools).

On the second issue, the Court divided 6-3 in holding that the coverage of Federal regulations applied strictly to the "program of activity" benefiting from Federal support. Where Grove City College was concerned, said the majority opinion, only the financial-aid program was covered. Justice Byron R. White stated, "...we have found no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow Federally aided students from classroom to classroom, building to building, or activity to activity."

It was the latter part of the decision that provoked outraged claims of the nation's civil rights laws having been placed in jeopardy. In particular, feminists worry that an emphasis on the "program-specific" nature of Title IX would remove Federal pressure on schools and colleges to assure equal funding for men's and women's sports, which are not direct recipients of government funding. The proponents of the Civil Rights Act of 1984 insist that the civil rights laws must not be "program-specific," and that an institution getting Federal money, whether directly or indirectly, must be entirely covered in all of its parts, personnel, programs, and activities by the full panoply of statutes barring discrimination.

As it happens, the Supreme Court's definition of the "program-specific" nature of Title IX is not new. Two years ago, in an employment discrimination case called *North Haven Board of Education v. Bell*, the Court wrote at length on that very point. In holding that Title IX covered employees as well as students, a majority of the Court (with Chief Justice Warren E. Burger and Justices Lewis F. Powell Jr. and William H. Rehnquist dissenting) agreed that "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitations" of the Act.

ON THE MERITS, it is difficult to argue that *Grove* diluted the nation's civil rights laws, for the Supreme Court had previously considered them to be "program-specific." Moreover, the Court here extended the reach of the civil rights laws to cover all direct and indirect recipients of Federal aid, a definition wide enough to include every public agency, every tax-exempt institution, and virtually every private organization as well. If anything, therefore, the decision broadened the reach of the laws by defining so anomalous an institution as Grove City College a "recipient" of Federal money, even though it never directly received a Federal grant, loan or contract.

EQUAL·JUSTICE·UNDER·LAW

But since the question at the heart of the subsequent controversy has concerned Congress' intent—did it mean to apply the laws to specific programs receiving Federal funds or to entire institutions receiving Federal funds?—clarifying Congressional action is entirely justified. Although *Grove* seems to have been massively misinterpreted, the new Civil Rights Act could help to eliminate some inconsistencies in enforcement. There is no valid reason why an institution should receive Federal funding in one program, yet be free to discriminate against women or blacks or handicapped persons in another program that has no Federal funding. Nor should discrimination due to race, gender, handicap, religion, or national origin be permissible in any aspect of American life.

The problem with the Civil Rights Act of 1984, in short, is not the principle it enunciates. Rather it is Congress' failure to confront controversial practices. The sponsors of the new legislation stress that it will break no new ground, but they have an obligation to clear up the old ground—to settle many of the issues that have clogged court calendars in recent years.

Will the new law cover private and parochial schools (almost all of which receive direct and indirect Federal dollars)? Will all tax-exempt institutions be considered recipients of Federal assistance? Will all institutions, agencies, and businesses covered by the new law be required to prepare an ethnic census and to adopt affirmative action personnel policies? Will the new law permit or prohibit competency tests for employment or graduation if people of different races pass in different proportions? Will the new law promote or prohibit quotas based on race, gender, age, handicap, and national origin? Should statistical disparities among racial groups, ethnic groups, religious groups, and the sexes on tests or in the workforce serve as proof of discrimination?

In the absence of an unambiguous declaration of Congressional intent on these kinds of issues, the regulation writers and the judiciary have moved steadily toward establishing what Nathan Glazer has described as "affirmative discrimination." In the process, the original intent of the Civil Rights Act of 1964 seems to have been transformed into something quite different. Instead of becoming a nation where each person is treated as an individual without regard to such characteristics as race, national origin and gender, we are developing an increasingly pervasive social policy of using these qualities as conditions of entry to education and employment. If this result is what Congress intends by enacting the Civil Rights Act of 1984, then it should take responsibility for its actions. If not, then it should make its positions plain for those who will write the regulations and interpret the laws.

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WILLIAM J. LEHRFELD
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August 3, 1984

Stephen J. Markman, Esq.
Deputy Chief Counsel
Committee on the Judiciary
2226 Dirksen Office Building
Washington, D.C. 20510

Re: S. 2568, the Civil Rights Act of 1984

Dear Mr. Markman:

This firm represents the Knights of Columbus, with headquarters in Hartford, Connecticut. This organization has 1.4 million members, organized in 7,814 councils throughout the United States, Canada, Mexico and the Philippines. Its purposes are to build a sense of religious fraternity in its members, to assist the members and their families in distress, and to promote the social and religious programs of the Catholic Church. Membership in the Knights is limited to male practical Catholics over the age of 18. All Roman Catholic priests are eligible to become life members of the Knights. The Knights is fundamentally family-oriented, and it has active programs and auxiliaries in which about 3.5 million children and women relatives of members participate. In addition, the Daughters of Isabella, the Catholic Daughters of America, and the Columbiettes are sororal organizations which are related to but independent of the Knights of Columbus. Their over 300,000 members are all female Catholics.

We would like to express to you our concerns about with certain ambiquities and problems in the Civil Rights Act of 1984.

1. Probably the greatest problem is the possible interpretation of this legislation as endorsing the decision of the United States District Court in McGlotten v. Connally, 338 F. Supp 448 (D.D.C., 1972). There the district court held that federal tax exemptions, and eligibility to receive tax deductible contributions, constituted "federal financial assistance" within the meaning of Title VI of the Civil Rights Act of 1964. Under the so-called "reenactment doctrine", the Civil Rights Act of 1984 could be viewed as endorsing that decision. This is so despite the fact that the Executive Branch has continuously and consistently refused to follow the McGlotten decision. See pages

67-77 of the Brief of the Secretaries of Treasury and Health, Education and Welfare in Greenhouse v. Greco, attached.1/

Of course, if federal tax benefits were treated as "federal financial assistance" under the four nondiscrimination statutes in issue, all churches, other charities, veterans organizations, and fraternals, would be subject to all compliance requirements. For such organizations all are tax-exempt, and are eligible to receive tax deductible contributions.

In order to avoid this problem, the legislative history should state that the Executive Branch has always treated federal tax benefits as not constituting federal financial assistance within the meaning of the statutes in question. It should be made clear that S. 2568, by codifying existing administrative practice, will continue this administrative policy. Accordingly, under S. 2568, federal tax exemption under 26 U.S.C. Sections 501(c)(3) or 501(c)(8), and eligibility to receive tax deductible contributions under 26 U.S.C. Section 170(c) and correlative tax statutes, will not be treated as federal financial assistance. Nor would tax credits for nursery school expenses now granted by 26 U.S.C. Section 44A, or tax credits which would be allowed by the pending S. 528, constitute federal financial assistance under S. 2568. The legislative history should also state that no inference is to be derived from S. 2568 as to the correctness of past judicial decisions on whether tax benefits constitute federal financial assistance.

2. The vague definitions of "recipient" and "education recipient" in the proposed statute would create other problems for churches and the religious organizations which they control. It is our understanding that the administrative practice is to treat as separate units or subunits the worship functions of churches, as distinct from the religious schools and similar units which they own or control, regardless of the formal legal status of these organizations. This position is based in part on Constitutional principles, for it is questionable whether the Government can require nondiscrimination in the strictly worship and prayer functions of a church. We believe that it would be prudent to refer to this distinction in the committee report. Thus a local congregation of a religious denomination should be treated as an institution separate from any elementary or secondary school which such local congregation owns or controls, even if the school and local congregation are components of one legal entity.

1/ I was principally responsible for presenting this position to the federal courts during my service in the Department of Justice.

Moreover, we think it appropirate for the committee report to clarify further the meaning of "subunit" in a religious school context. A congregation-owned or controlled elementary school should be treated as a recipient separate from a congregation-owned or controlled secondary school, even if the two institutions are legally part of the same corporation. Similarly, a diocese or other governing church body should be treated as a recipient separate from each local congregation, orphanage, hospital, elementary school, etc., which it controls.

3. The Knights of Columbus has discovered an analogous problem in their organization. Several of their local councils may receive some federal financial assistance in connection with their programs for the elderly, and the question could arise whether such assistance is attributable to the national or regional units of the Knights. As in most fraternal organizations, the relationship between the Knights' national and regional bodies and their local councils is *sui generis*, involving varying control and independence features. We believe that the legislative history should make clear that, in the case of fraternal organizations, local lodges will be treated as units or subunits separate from their national or regional bodies. Otherwise, fraternal organizations would be reluctant to allow their local lodges to participate in such programs, for fear of subjecting the entire organization to complex federal controls.

Thank you for your assistance in this matter.

Sincerely yours,

Leonard J. Henzke Jr.